No. 01-455-CFX

Title: Franconia Associates, et al., Petitioners
v.
United States
and
Grass Valley Terrace, et el. Petitioners
v.
United States

Docketed:
September 17, 2001

Court: United States Court of Appeals for the Federal Circuit

Entry	Date	Proceedings and Orders
	Jul 27 2001	Application (01A89) to extend the time to file a petition for a writ of certiorari from August 15, 2001 to September 10, 2001, submitted to The Chief Justice.
	Jul 31 2001	Application (01A89) granted by the Chief Justice extending the time to file until September 14, 2001.
	Sep 10 2001	Petition for writ of certiorari filed. (Response due November 16, 2001)
	Oct 12 2001	Order extending time to file response to petition until November 16, 2001.
	Nov 16 2001	Brief of respondent United States in opposition filed.
	Nov 27 2001	Reply brief of petitioners filed.
	Nov 28 2001	DISTRIBUTED for Conference of January 4, 2002.
	Jan 4 2002	Petition GRANTED. limited to the following questions: 1) Whether a breach of contract claim accures for purposes of 28 U.S.C. Sec. 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans. 2) Whether a Fifth Amendment takings claim accrues for purposes of 28 U.S.C. Sec. 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans. SET FOR ARGUMENT April 15, 2002. **********
	Feb 15 2002	Brief amicus curiae of National Association of Home Builders filed.
	Feb 19 2002	Brief amici curiae of Bank of America, FSB, et al. filed.
	Feb 19 2002	Brief amicus curiae of Council for Affordable and Rural Housing filed.
	Feb 19 2002	Brief amici curiae of John K. Castle, et al. filed.
	Feb 19 2002	Brief of petitioners Franconia Associates, et al. filed.
	Feb 28 2002	Motion of petitioners to dispense with printing the joint appendix filed.
	Mar 14 2002	Record filed.
	Mar 18 2002	Motion of petitioners to dispense with printing the joint appendix GRANTED.
	Mar 20 2002	CIRCULATED.
	Mar 22 2002	Brief of respondent United States filed.
	Apr 5 2002	LODGING consisting of twenty sets of two Rural Housing Service documents submitted by counsel for the petitioner and distributed.
	Apr 8 2002	Reply brief of petitioners Franconia Associates, et al.

2pp

No. 01-455-CFX

Entry	Date	Proceedings and Orders
		filed.
	Apr 15 2002	ARGUED.
	Jun 10 2002	Adjudged to be REVERSED and REMANDED Ginsburg, J., delivered the opinion for a unanimous Court.

Supreme Court, U.S.
FILED

01 455 SEP 10 2001

OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

FRANCONIA ASSOCIATES, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

◊

GRASS VALLEY TERRACE, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI

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231 pp

QUESTIONS PRESENTED

This case presents the question of when the six-year statute of limitations set forth in the Tucker Act, 28 U.S.C. § 2501, begins to run where the federal government, by statute, attempts to modify its contracts as it did in the *Winstar* and *Mobil* cases. The specific issues presented are:

1. Whether the government can eliminate contract rights *ipse dixit* through the enactment of legislation aimed at relieving the government of its contractual obligations, so that an aggrieved party's contract claim accrues immediately when a statute is passed announcing that the government might not perform its future contract obligations, rather than at the later date when the government actually fails to perform?

2. Whether the "as-applied" taking claims of property owners participating in a government housing program accrued immediately upon the *enactment* of legislation that expressly left open the possibility that the owners still would be permitted to leave the program and use their properties as they desired, rather than at the later date when the government *applied* the legislation to render a decision on the permitted use of the properties?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The following parties are Petitioners in *Franconia Associates v. United States:*

Dublin Plaza, Inc.
Evergreen Manor Associates
Fox Ridge Phase II
Franconia Associates
Marilyn Graham
Greenway of Altoona Associates, Phase I
Greenway of Newton Associates, Phase I
David A. Hodges, Sr.
David A. Hodges, Sr. and Joanne M. Hodges
Phoebe J. Perri
Pine Needles Apartments
Prairie Village of Altoona Associates
Prairie Village of Grimes Associates
Prairie Village of Huxley Associates
Prairie Village of LaPorte City Associates
Prairie Village of Slater Associates
Prairie Village of State Center Associates
R.C. Getty Apartments
R.C. Mo Apartments
R.C. Pierre Apartments
R.C. Springs Apartments
Scenic Valley Associates
Timberbrook Properties
Valley Associates
Brian E. Wells

The following parties are Petitioners in *Grass Valley Terrace v. United States:*

Margorie W. Kassner
Eileen R. Kothe
NRCB Limited Partnership

Peters, Williams & Kubota
Pine Needle Apartments Limited Partnership
Richard and Beatrice Schmidtbauer
The Highlands, a Limited Partnership

The following parties are plaintiffs in the trial court action in *Franconia Associates v. United States,* but were not appellants before the Federal Circuit and are not Petitioners herein:

Eastwood Apartments
Greenway of Altoona Associates, Phase II
Prairie Village of Adel Associates
Prairie Village of Parkersburg Associates
Tucker Properties
Tucker Properties II

The following parties are plaintiffs in the trial court action in *Grass Valley Terrace v. United States,* but were not appellants before the Federal Circuit and are not Petitioners herein:

Grass Valley Terrace
Jefferson Commons
Ripon Manor
Rural Community Builders
Waterloo Glen

Pursuant to Rule 29.6, Petitioners state that of the forty-three parties listed above, only one, Dublin Plaza, Inc., is a corporate entity. All other Petitioners and parties to the proceedings below are either individuals, partnerships, or limited partnerships. There are no parent corporations or publicly held companies that own ten percent or more of the stock of Dublin Plaza, Inc.

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TEXT OF STATUTES AND REGULATIONS

The pertinent text of the statutes and regulations at issue in this matter is reproduced in the Appendix ("App.") attached hereto. *See* App. A71-105. The provisions most significant to the disposition of this petition are as follows:

28 U.S.C. § 2501 Time for filing suit

Every claim of which the United States Court of Federal claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

42 U.S.C. § 1472(c) Prepayment and refinancing provisions

* * *

(4)(A) Agreement by borrower to extend low income use.

Before accepting any offer to prepay, or requesting refinancing in accordance with subsection (b)(3) of this section of, any loan made or insured under section 1484 or 1485 of this title pursuant to a contract entered into prior to December 15, 1989, the Secretary shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed.

* * *

(5)(A) Offer to sell to nonprofit organizations and public agencies

(i) In general

If the Secretary determines after a reasonable period that an agreement will not be entered into with a borrower under paragraph (4), the Secretary shall require the borrower (except as provided in subparagraph (G)) to offer to sell the assisted housing and related facilities . . .

* * *

(G) Exception

This paragraph shall not apply to any offer to prepay, or any request to refinance in accordance with subsection (b)(3) of this section, any loan made or insured under section 1484 or 1485 of this title pursuant to a contract entered into prior to December 15, 1989, if –

* * *

(ii) the Secretary determines that housing opportunities of minorities will not be materially affected as a result of the prepayment or refinancing, and that –

(I) the borrower (and any successor in interest thereof) are obligated to ensure that tenants of the housing and related facilities financed with the loan will not be displaced due to a change in the use of the housing, or to an increase in rental or other charges, as a result of the prepayment or refinancing; or

(II) there is an adequate supply of safe, decent, and affordable rental housing within the market area of the housing and related facilities and sufficient actions have been taken to ensure that the rental housing will be made available to each tenant upon displacement.

7 C.F.R. § 1965.215 Borrower rejection of incentive offer – approving/disapproving prepayment

* * *

(c) *Conditions under which prepayment may be approved.* In certain instances, prepayment may be approved after a borrower has rejected the incentive offer. . . . To determine whether a prepayment offer can be approved, the following decision steps must be followed by the Servicing Office:

* * *

(3) *It is determined by FmHA or its successor agency under Public Law 103-354 that restrictions are not needed.* If actions in accordance with § 1965.206 (b)(2) of this subpart and paragraph (e)(3) of this section have been taken to ensure that alternative rental housing will be made available to each tenant upon displacement, the prepayment may be accepted without restrictions if:

* * *

(iii) Regardless of whether or not the loan is subject to restrictive-use provisions, a determination is made by FmHA or its successor agency under Public Law 103-354 that there is no longer a need for the housing (in accordance with exhibit E of this subpart).

CONSOLIDATED PETITION FOR CERTIORARI

Petitioners Franconia Associates, et al., and Grass Valley Terrace, et al. ("Petitioners"), respectfully petition this Court for a writ of certiorari to review two decisions of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

Franconia Associates v. United States, No. 97-381C, 43 Fed. Cl. 702 (May 9, 1999), *recons. denied*, 44 Fed. Cl. 315 (July 21, 1999), *aff'd*, No. 99-5123, 240 F.3d 1358 (Fed. Cir. Feb. 15, 2001), *reh. denied* (Fed. Cir. June 12, 2001).

Grass Valley Terrace v. United States, No. 98-726C, 46 Fed. Cl. 629 (Apr. 12, 2000), *aff'd*, No. 00-5094 (Fed. Cir. May 17, 2001) (*per curium*).

JURISDICTION

This petition seeks review of two closely-related decisions of the Federal Circuit. The Federal Circuit issued an opinion in *Franconia Associates v. United States* ("*Franconia*") on February 15, 2001. Petitioners then timely filed a Petition for Rehearing En Banc, which the Federal Circuit denied on June 12, 2001. In the interim, the Federal Circuit issued a *per curium* decision in *Grass Valley Terrace v. United States* ("*Grass Valley*") on May 17, 2001.

This Court has jurisdiction under 28 U.S.C. § 1254(1). On July 27, 2001, Petitioners timely filed an application for an extension of time, requesting permission to file a Consolidated Petition for Writ of Certiorari addressing both cases on September 10, 2001. The Court granted Petitioners' application by Order dated July 31, 2001, extending the filing deadline in *Grass Valley* until September 14, 2001.

STATUTES AND REGULATIONS INVOLVED

Tucker Act, 28 U.S.C. § 2501 (1994) (App. 82); 42 U.S.C. § 1472(c) (1994) (App. 83-90); 7 C.F.R. § 1965.215 (2000) (App.

91-105); Emergency Low Income Housing Preservation Act, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988) (App. 71-81).

STATEMENT OF THE CASE

I. Overview

Petitioners are owners of properties used as affordable housing in rural areas of the United States. The housing was financed by mortgages issued by the Farmer's Home Administration ("FmHA"),[1] an agency of the Department of Agriculture, pursuant to Section 515 of the Housing Act of 1949 (the "Section 515 program"). According to contracts executed by each owner upon entering into the Section 515 program and regulations then in effect, the owners had the option to prepay their mortgages at any time during their fifty-year mortgage terms. Upon prepayment, the owners could terminate their participation in the program and use their buildings as market-rent properties.

So long as the properties remained in the Section 515 program, the owners could earn only a marginal annual return representing a small percentage of their initial down payment. As a result, Petitioners intended from the very beginning to prepay their mortgages as soon as circumstances would allow in order to realize the full economic potential of their properties. Without the ability to terminate their participation in the program at some time before each of their full mortgage terms expired, none of the Petitioners ever would have entered into the program.

In 1988, however, Congress passed a law setting up a new scheme for determining whether FmHA would have to approve requests by owners to prepay. The new regime only allows an owner to prepay without any restrictions if the agency determines in its discretion that, among other

[1] Although the agency formerly known as the FmHA is now known as the Rural Housing Service, this petition, like the opinions below, will refer to the agency by its original name.

things, there is no longer a need for affordable housing in the area where the property is located. If the agency cannot make this determination, an owner desiring to leave the program must either agree to remain in the program for an extended period of time or risk losing the property through a forced sale to a public or non-profit entity.

Each of the owners in this action decided at some point following the passage of this legislation to exercise its prepayment option and leave the Section 515 program. However, none of them could, upon their intended prepayment dates, meet the statutory exception allowing the agency to accept requests to prepay without any restrictions. As a result, Petitioners remain trapped in the program and subject to its severe income restrictions with no reasonable means of escaping before their full fifty-year mortgage terms expire. Plaintiffs therefore brought suit, alleging counts for breach of contract and a taking of their property.

The Federal Circuit held in *Franconia*[2] that Petitioners' claims were barred by the six-year statute of limitations set forth in the Tucker Act, finding that both the contract claims and the taking claims accrued automatically on the date that the legislation was enacted. The decision was premised on a number of fundamental errors of law, including:

- The court exempted the government from ordinary contract law principles by holding that (1) the legislation, which was specifically targeted at relieving the government from its obligations under the contracts, immediately "eliminated" Petitioners' contract rights, (2) the legislation constituted an immediate breach of Petitioners' prepayment option, even though the contracts entitled owners to exercise

[2] The other decision at issue, *Grass Valley*, was a *per curiam* decision issued by the Federal Circuit following *Franconia*. The *Grass Valley* decision affirmed the dismissal, on limitations grounds, of contract claims that are materially identical to the contract claims in *Franconia*. Because the Federal Circuit did not issue a written opinion in *Grass Valley*, the discussion herein is focused on the court's analysis in *Franconia*.

this option *at any time* during their full mortgage terms, and (3) Petitioners' prepayment option imposed no reciprocal obligation on the government to *accept* prepayment requests made by owners, thus rendering the contracts illusory; and

• The court failed to recognize that, because the legislation expressly left open the possibility that owners would be permitted by the agency to prepay and use their properties as they desired, each owner's taking claim did not accrue until the FmHA applied the legislation by rendering a decision on the owner's prepayment request.

The Federal Circuit in effect held that every Section 515 owner in the country who might desire to prepay at some point during their fifty-year mortgage terms was required to bring suit within six years after the enactment of the statute in February 1988 on pain of having their claims time-barred, regardless of whether they had any intention of prepaying during that window of time. The decision thus contravenes the established precedent of this Court and wreaks havoc on settled principles of law. The decision also disposes of the claims of hundreds of housing owners who invested in the program based on express government commitments and who are now stranded in the program as a result of the government's failure to live up to its obligations. The decision extinguishes these owners' claims only because they failed to file suit prematurely.

II. Statement of Facts

A. The Section 515 Program

Beginning in the 1960s, the federal government established several programs encouraging private citizens to construct, own, and manage federally-assisted affordable housing units. *See* Cohen & Mattis, *Prepayment Rights: Abrogation by the Low-Income Housing Preservation and Resident Homeownership Act of 1990*, 28 REAL. PROP. PROB. & TR. J. 1, 2-4 (1993). The so-called "Section 515" program at

issue in this case was one such program. Section 515 of the Housing Act of 1949 (codified at 42 U.S.C. § 1485), added to the Act in 1962, authorized the FmHA to enter into contracts with private owners to make loans for the purpose of developing housing for low- and moderate-income and elderly tenants in rural areas. Owners retained titled to their properties while in the program, but were permitted to collect only a minimal annual return on their initial investment.[3] App. A170. The owners also were required to accept only eligible persons as tenants, to charge no higher rents than permitted by FmHA, to maintain cash reserves, and to comply with certain regulations not inconsistent with the terms of their contracts. App. A169-72, A177, A181.

Mortgage loans under the program had terms of up to fifty years. App. A165, A176. Obviously, few owners would be willing or able to accept the income restrictions required by the program for such a long period of time, which likely would not even expire within their own lifetimes. Although certain tax benefits initially were available under the program, those benefits ran out as each project's depreciation schedule expired. *See* 125 Cong. Rec. 18204 (1979) ("The tax advantage in this type of project looks toward a maximum term of about 10 years."). Thus, unless owners could capitalize on their long-term investment in the housing units at some point during the normal useful life of those units, the strict limitations on the properties' income potential would have made the projects uneconomical and

---

[3] The return permitted under the program was 8% of the owners' "initial investment" in the property, *i.e.*, its down payment, rather than 8% of its equity in the property or its market value. App. A170. For example, an owner that made a $91,237 down payment on a project with a $1,238,000 mortgage would earn only a maximum of $7,299 per year so long as it remained in the program. *Id.* Assuming that after twenty years the owner built up $1,000,000 of equity in the property and that the market value of the property as a commercial apartment complex had risen to $2,000,000, the owner would still receive at most only $7,299 per year, which would amount to only 0.73% of its equity and only 0.36% of the property's market value.

no reasonable investor would have participated in the program. Something more was required to induce owners to enter into the program.

That "something more" was the termination option – the government's assurance that an owner could escape these income restrictions and convert the property to conventional market-rate housing by paying off the loan before the end of its term. Pursuant to the discretion conferred on it by Congress, the FmHA included the following provision in the promissory note executed by each owner:

> Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower.

App. A176. This provision reflected contemporaneous FmHA regulations. *See* 7 C.F.R. § 1822.95(c) (1978).

The termination option was a critical component of the Section 515 program from the perspective of both the owners and the government. None of the Petitioners would have entered into the program or signed its contract absent the right to prepay and leave the program at some time before the expiration of its mortgage term, at which point each owner could convert to market rents or sell the property based on its commercial market value. Petitioners thus entered into the program with specific long-term investment goals that could not be achieved absent the right to prepay and terminate their participation in the program. *See Cienega Gardens v. United States*, 38 Fed. Cl. 64, 75 (1997) (finding that under a similar housing program, prepayment served as one of the "primary incentives," an "essential aspect" of the program, and an "enticement" without which the owners would not have entered into the program), *rev'd on other grounds*, 162 F.3d 1123 (Fed. Cir. 1998).[4]

[4] Petitioners did not, as the courts below assumed, invest in the Section 515 program to obtain a low-interest rate loan. *See* App. A3, A17, A46.

From the government's perspective, the ability of owners to prepay and ultimately use their properties as market-rate investments served as a chief inducement to recruit private parties to enter into the program. *Id;* Belden & Wiener, HOUSING IN RURAL AMERICA 122 (noting that the Section 515 program was "predicated on the assumption that private, profit-motivated owners could be enticed to build, own and operate low-income rental housing" and that "prepayment is wholly consistent" with this strategy). Further, the money received through prepayment could be used to finance additional rural housing under the program. *See* 42 Op. Att'y Gen. 417, 419 (Dec. 29, 1969).

B. Subsequent Legislation

Not surprisingly, as time passed, many owners began to exercise their termination option, prepaying their loans to realize the investment returns to which their contracts entitled them. *See* H.R. Rep. No. 96-154, 96th Cong., 1st Sess. at 43 (1979), *reprinted in* 1979 U.S.C.C.A.N. at 2359. The FmHA maintained that it was contractually required to accept such prepayments despite concern that doing so would significantly reduce the supply of affordable housing. *Id.* (noting that FmHA "believes it must honor requests to prepay or refinance these loans").[5] To curb this potential

The effective interest rates on the loans (which were not in fact low, *see, e.g.,* App. A176) provided the owners no benefit whatsoever, because the *only* profit owners could receive while in the program was a minimal annual return on their initial investment. The true beneficiaries of the government subsidies that produced an effectively low interest rate are the tenants, in that the government subsidies permit rents to remain low.

[5] Congress initially responded by passing a statute in 1979 that restricted the FmHA's authority to accept prepayments of Section 515 loans. Pub. L. No. 96-153, § 503, 93 Stat. 1134 (1979). In response to the political uproar caused by this repudiation of the owners' rights, however, Congress repealed the statute in 1980 and restored the termination option for loans issued prior to 1979. The 1980 legislation also required new owners to agree to operate their properties as low-income housing for a minimum of 15 or 20 years. Pub. L. No. 96-399, § 514, 94 Stat. 1671 (1980).

loss of housing, Congress imposed a series of moratoriums from 1986 through 1988 greatly restricting the ability of Section 515 owners to prepay their mortgages. Before the last moratorium expired, on February 5, 1988 Congress enacted the Emergency Low Income Housing Preservation Act, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988), *codified as amended at* 42 U.S.C. § 1472(c) ("ELIHPA") (App. A71-81).

Whereas the relevant contracts and regulations obligated the FmHA to accept prepayment requests made by owners "at any time at [their] option," ELIHPA drastically limited the circumstances under which the agency could accept such requests. First, ELIHPA prohibits the FmHA from accepting any prepayment until it has attempted to secure the owner's agreement to give up the termination option and extend the low-income use of the property for at least an additional twenty years. 42 U.S.C. § 1472(c)(4)(A) (App. A83).

Second, if an owner will not surrender its termination option and agree to extend the low-income use of the property, ELIHPA compels the owner, before exercising that option, to offer the property for sale to any qualified nonprofit organization or public agency for a six month period. *Id.* § 1472(c)(5). A buyer can be "qualified" by the FmHA only if it agrees to maintain the low-income use of the property, and no sale can be completed unless the agency approves the purchase price. *Id.* Although a hapless owner theoretically could prepay at the end of this "forced-sale" period if no "qualified" buyer emerges, the owner first has to gamble that its property will not be snatched away at a price not determined on the open market.

This change in the governing law is the basis for the two classes of plaintiffs in the original actions below – owners with claims based on pre-1979 contracts, whose original termination rights were restored by the 1980 legislation, and owners with claims based on post-1979 contracts, whose termination rights have always been exercisable only after a minimum of 15 or 20 years. Petitioners are all "pre-1979" owners, due to the fact that ELIHPA addressed only pre-1979 contracts and, as a result, only the pre-1979 claims were dismissed by the lower courts as untimely.

Third, if an owner is unwilling either to extend its participation in the program or subject itself to the six-month forced-sale process, ELIHPA permits an owner to prepay only if he or she agrees to maintain the low-income rental rates until the current tenants choose to move out. *Id.* § 1472(c)(5)(G)(ii)(I) (App. A89). The relevant regulations make clear that by agreeing to this restriction, an owner cannot require a tenant to move out, other than for cause, until "the end of the remaining useful life of the project." 7 C.F.R. Pt. 1965, Subpart E (1997), Ex. A-4.

ELIHPA also provides one exception that, while narrow, is key to the outcome of this matter. If the FmHA makes a discretionary decision that there is no longer a need for the housing in the area where it is located, and that housing opportunities for minorities will not be adversely affected, the owner can prepay and leave the program with no strings attached, consistent with the terms of its contract and the contemporaneous regulations. 42 U.S.C. § 1472(c)(5)(G)(ii) (App. A89). Thus, the statute does not in all cases prohibit withdrawal from the program. Instead, the agency must accept an owner's request to prepay without restriction if the statutory conditions are satisfied when the request is made. [6]

C. Application of the Legislation

Following passage of ELIHPA, the FmHA denied applications submitted by various Petitioners requesting to prepay their mortgages without any restrictions. App. A129. Other Petitioners who decided to prepay were informed by the agency and others that, based on then-existing market conditions in the area of their properties, any prepayment request would be denied under the requirements of the new statute, and that submitting a request therefore would be

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[6] The prepayment restrictions imposed by ELIHPA on pre-1979 contracts, which were only "interim" in nature (*see* ELIHPA § 202(a)(9),(10)), were made permanent – and extended to post-1979 contracts – by another statute which was passed on October 28, 1992. Pub. L. No. 102-550, §§ 2, 712, 106 Stat. 3681, 3841 (1992).

futile. *Id.* Thus, none of the Petitioners was able, at the time it desired to exercise its termination option, to satisfy the statutory conditions for prepaying without restrictions. Consequently, Petitioners remain stranded in the Section 515 program and subject to its severe income restrictions to this day, and likely will remain stranded until their fifty-year mortgage terms expire, despite their express desire to prepay and convert to market rents as soon as their personal circumstances and market conditions would allow.

Petitioners filed suit in the Court of Federal Claims in 1997 (*Franconia*) and 1998 (*Grass Valley*) asserting two counts: (1) a contract claim alleging that ELIHPA constituted an anticipatory repudiation of their option to prepay their mortgages at any time, and (2) a taking claim alleging that the legislation, as applied to their properties, effected takings of their real property interests. App. A132. To date, no discovery has taken place on any of Petitioners' claims.

III. Proceedings Below

A. Proceedings Before the Court of Federal Claims

The Court of Federal Claims issued its decision in *Franconia Associates v. United States* on May 6, 1999, in which it granted the government's motion to dismiss Petitioners' contract claims on limitations grounds. The court held that ELIHPA constituted an immediate breach of Petitioners' contracts, rather than an anticipatory repudiation, and that their contract claims thus accrued on the date that the agency issued regulations implementing the statute. App. A28-29. To reach this conclusion, the court found that the prepayment clause of Petitioners' contracts imposed no duty of performance on the government whatsoever:

> A careful reading of this clause reveals that no performance by the government is required - it is merely a promise to *allow* the borrower to prepay at any time during the life of the loan (emph. added).

App. A31; *see also* A32 ("[T]here was no performance due by the government under the contract."). The court concluded that the contracts imposed on the government nothing more than a continuing obligation to "keep its promise," and thus the contracts were breached when the government ceased keeping its promise by changing the law. *Id.*

Although the government did not move to dismiss Petitioners' taking claims, and although there had been no discovery or briefing with respect to those claims, the trial court went on to dismiss Petitioners' taking claims *sua sponte*, finding that those claims accrued on the same date as the contract claims. Without any citation to the pleadings, the court characterized plaintiffs' allegations as asserting that a taking occurred when the government "passed the legislation because the mere passing of the legislation, *ipso facto*, deprives plaintiffs of their vested right to prepay." App. A24. Thus, the court deemed Petitioners' taking claims to allege solely a "facial" taking of their contractual right to prepay, which the court determined would have accrued upon the passage of the legislation (or, as the court held, upon issuance of the implementing regulations).[7] App. A34.

Following *Franconia*, the Court of Federal Claims issued a nearly identical decision on the contract claims of the Petitioners in *Grass Valley Terrace v. United States* on April 12, 2000. The *Grass Valley* court agreed with the *Franconia* court that the only performance due by the government under the prepayment clause was "to keep its promise to *allow* borrowers an unfettered prepayment right." App. A56; *see*

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[7] Petitioners sought reconsideration of the court's opinion on a number of grounds, including the fact that the court had mistakenly assumed that none of the Petitioners had requested to prepay. As an example, Petitioners submitted a declaration from Petitioner Phoebe Perri in which she detailed her attempts to prepay and the FmHA's denial of her request. App. A157-58. Because there has been no discovery on the subject claims, Ms. Perri's declaration stands as the only evidence in the record on appeal concerning Petitioners' efforts to prepay. The court acknowledged that it had misstated the facts, but denied the motion. *See* 44 Fed. Cl. 315 (1999).

also id. at 55 (rejecting argument that the contracts obligated the government "to *accept* prepayment") (emphases added). However, unlike the *Franconia* court, the *Grass Valley* court dismissed only those claims on which the government had moved, *i.e.*, Petitioners' contract claims.

B. Proceedings Before the Federal Circuit

Upon appeal from the trial court's decision in *Franconia*, the Federal Circuit affirmed, holding that ELIHPA immediately "eliminated" and "took away" Petitioners' contract rights. App. A10, A14. The court concluded that any breach occurred on the day that the statute was enacted (rather than when the regulations were issued, as the trial court held). *Id.* A10. The Federal Circuit also adopted the trial court's reasoning that "the note's prepayment provision did not require any performance on the part of the government" and that the government thus had no more than an intransitive duty "to continue to allow borrowers the unfettered right to prepay their loans at any time." *Id.*

The court then disposed of Petitioners' taking claims, seemingly as an after-thought to its holding on the contract claims. The court defined Petitioners' taking claims – contrary to their allegations and arguments – as asserting solely a taking of their "unfettered right to prepay." *Id.* A14. By setting Petitioners' claims up in this manner, the court was driven to the conclusion that, because this right "was eliminated by the government with the passage of ELIHPA," Petitioners' taking claims accrued upon enactment of the statute. *Id.* In so holding, the court made no mention of the fact that the statute vests the agency with authority to grant prepayment requests in certain circumstances.

Petitioners sought rehearing in *Franconia*, based in part on the Federal Circuit's prior opinion in *Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999). In *Greenbrier*, the court applied the precedent of this Court to hold that the taking claims of owners under a materially identical housing

program accrued, not upon the enactment of ELIHPA, but at the later date when the agency rendered a final decision on a prepayment request from each owner. The court denied the petition for rehearing on June 12, 2001. App. A70.

Following the issuance of the Federal Circuit's decision in *Franconia*, but before it denied rehearing in that case, the court issued a *per curium* decision in *Grass Valley* in which it affirmed the dismissal of Petitioners' contract claims on statute of limitations grounds. App. A15. Although no written opinion accompanied the order, the court's decision evidently was based on its holding in *Franconia*.

REASONS FOR GRANTING THE PETITION

This case presents significant legal issues concerning when contract and taking claims against the federal government accrue for purposes of the statute of limitations set forth in the Tucker Act, 28 U.S.C. § 2501. This Court has recognized that cases presenting limitations issues are important because of the fairness and judicial efficiency policies they present.[8] In this case, however, the Federal Circuit applied the statute of limitations in a manner that raises deeper concerns of fairness and gross judicial inefficiency. This case also impacts a large class of regulated parties and government contractors.

The decision below squarely conflicts with the firmly established precedent of this Court in both contract and takings cases, thereby upsetting settled expectations and creating confusion in the law. This confusion may lead other claimants to file suit prematurely to avoid dismissal of their claims, imposing an unnecessary burden on the courts.

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[8] *E.g., Lampf v. Gilbertson*, 501 U.S. 350, 357 (1991) ("[L]imitations periods in general promote important considerations of fairness."); *Board of Regents v. Tomanio*, 446 U.S. 478, 487-88 (1980) (statutes of limitations "have long been respected as fundamental to a well-ordered judicial system"). For similar reasons, the Court has granted certiorari in many takings cases involving the ripeness doctrine. *See infra* at 24-25.

The decision also exempts the government from standard contract principles in a manner that permits claims against the government to be dismissed as time-barred, when in any other context the claims clearly would be deemed timely. By rendering otherwise valid contract rights unenforceable in this manner, the decision endangers the government's credibility as a reliable business partner. Finally, the decision threatens to extinguish the claims of hundreds, perhaps thousands, of Section 515 owners across the country,[9] and impacts countless other government contractors whose potential claims might be rendered time-barred under the Federal Circuit's unprecedented analysis.

I. The Federal Circuit Exempted The Government From Standard Contract Law Principles By Holding That The Legislation Constituted An Immediate Breach Of Petitioners' Prepayment Option.

"When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000) ("*Mobil*"); *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996) ("*Winstar*").[10] As this Court held in

[9] In addition to Petitioners, there are hundreds of similarly-situated owners with claims now pending before the Court of Federal Claims. *E.g.*, *Adams v. United States*, No. 96-699C; *Atwood-Leisman v. United States*, No. 98-815C; *Allegra Villa v. United States*, No. 98-823C; *Bellas Domas v. United States*, No. 98-826C. There are also countless other Section 515 owners in the country who have not yet attempted to prepay but may decide to do so in the future, who now will be unable to assert any claim against the government should their requests to prepay be denied. *See* Belden & Wiener, HOUSING IN RURAL AMERICA 117 (1999) (reporting that by August 1979, the FmHA had issued 6,874 loans under the Section 515 program).

[10] *Accord Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943) ("The United States does business on business terms."); *Perry v. United States*, 294 U.S. 330, 352 (1935); *Cooke v. United States*, 91 U.S. 389, 398 (1875) (when the United States "comes down from its position of

Winstar, holding the government accountable to such standards is essential to protect "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." 518 U.S. at 883. By contrast, a rule "expanding the Government's opportunities for contractual abrogation" would have "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *Id.* at 884. The Federal Circuit's decision in this case directly creates that very danger, in that it rejects contract claims against the government as time-barred when indistinguishable claims brought against a private party would be deemed timely and heard on their merits.[11]

A. The Federal Circuit Improperly Held That The Government Can "Eliminate" The Contract Rights Of Its Business Partners By Passing Legislation.

The Federal Circuit held that Petitioners' contract claims accrued upon the enactment of ELIHPA because the statute immediately "took away," "eliminated," and "conclusively abolished" their contract rights. App. A10, A14. Thus, the court in effect held that the government breached the contracts by passing a law. But standard contract law principles, recognized by this Court to apply against the government, make clear that it was the agency with whom

sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there").

[11] Given the unique jurisdiction of the Court of Federal Claims and the Federal Circuit, this Court has recognized the need to review cases emanating from those courts even in the absence of a split among the Circuit Courts. In fact, the Court has in recent years granted certiorari in three government contract cases from the Federal Circuit, all involving questions of the extent to which the government is bound by standard contract law principles. *See Mobil*, 530 U.S. 604; *Winstar*, 518 U.S. 839; *Hercules Inc. v. United States*, 514 U.S. 1049 (1995); *see also Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 89 (1993) (noting that the rules applied by the Federal Circuit are "a matter of special importance to the Nation").

Petitioners contracted, and not Congress, that breached the contracts. That breach occurred not when the applicable law changed, but rather when the FmHA enforced the new requirements against Petitioners by failing to accept their prepayment requests according to the terms of their contracts.

As the Ninth Circuit recently held, the government was not acting in its capacity as the sovereign when it enacted ELIHPA. *Kimberly Assoc. v. United States*, __ F.3d __, 2001 WL 930454, *4 (9th Cir. Aug. 17, 2001) (publication pending) (finding it "unquestionable" that "the government was not acting in a 'public and general' capacity" when it passed ELIHPA, which "constituted a narrow, targeted piece of legislation aimed at relieving the government from onerous provisions contained in a finite number of specific contracts it had already entered"); *accord Adams v. United States*, 42 Fed. Cl. 463, 480 (1998) (sovereign acts defense inapplicable because ELIHPA "specifically targeted the termination options found in FmHA's contracts"). As a result, the government's repudiation of Petitioners' contracts should not be afforded any special status simply because it came in the form of legislation.[12] The Federal Circuit's contrary holding that the legislation eliminated Petitioners' contract rights *ipse dixit* reflects a significant departure from standard contract law principles expressly held by this Court to be applicable to the government.

[12] *See Mobil*, 530 U.S. at 619-20 (where sovereign acts defense not raised, government actions in passing legislation analyzed under standard contract principles: "the fact that [the government's] repudiation rested upon the enactment of a new statute makes no significant difference"); *Alaska Pulp Corp. v. United States*, 48 Fed. Cl. 655, 659 (2001) (rules applicable to a party's repudiation of a contract are "no different where the government as a party to the contract commits this same sin through subsequent legislation"). Here, as in *Mobil*, the government cannot rely on the sovereign acts doctrine, having failed to raise the argument below.

B. ELIHPA Constituted An Anticipatory Repudiation Of Petitioners' Prepayment Option, Which Did Not Start The Statute Of Limitations.

One basic principle of contract law is the doctrine of anticipatory repudiation, set forth in the Restatement (Second) of Contracts § 250. *See Mobil*, 530 U.S. at 608.[13] The Restatement explains that a "repudiation" is a "statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach." *Id.* In response to such a statement of prospective nonperformance, the obligee may either sue for breach immediately or await the time that the obligor's performance under the contract comes due. Williston § 1337; *Roehm v. Horst*, 178 U.S. 1, 10 (1900) (finding it "reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done"). If the obligee elects to wait, the statute of limitations on a claim for breach does not commence to run until the time for performance arrives and the obligor actually fails to perform. *Kinsey v. United States*, 852 F.2d 556, 558 (Fed. Cir. 1988); 1 Corman, LIMITATION OF ACTIONS § 7.2.1 (1991).[14]

This Court's decision in *Mobil* makes clear how the doctrine of anticipatory repudiation applies in the context of

[13] Few precepts of contract law are more firmly entrenched than the doctrine of anticipatory repudiation, which can be traced back to the landmark case of *Horchster v. De la Tour*, 118 Eng. Rep. 922 (Q.B. 1853). *See* Corbin, CONTRACTS §§ 959, 1053 (1964); Jaeger, WILLISTON ON CONTRACTS §§ 824, 1300 et seq., 2027B (3d ed. 1968) ('Williston"); 17A Am. Jur. 2d, Contracts, § 448 et seq. (1990); Rowley, *A Brief History Of Anticipatory Repudiation In American Contract Law*, 69 U. CINN. L. REV. 565 (2001).

[14] As Professor Corbin explains, this rule serves important policy goals:

> The plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and he would be so penalized if the statutory period of limitation is held to begin to run against him immediately. Corbin, CONTRACTS § 989 (1964).

legislation passed by Congress. There, the government was obligated under contracts with oil companies to approve oil exploration plans submitted by the companies, if proper, within thirty days after submission. 530 U.S. at 609-10. Subsequent legislation, however, placed conditions on that approval, making it impossible for the government to approve plans submitted by the companies within the promised time frame. *Id.* at 611-12; *see also Conoco Inc. v. United States*, 35 Fed. Cl. 309, 318 (1996).

The trial court found, based on these facts, that the legislation constituted an "anticipatory repudiation" of the contracts. *Conoco, Inc.*, 35 Fed. Cl. at 327. This Court agreed, holding that "the Government's communication of its intent to commit [a] breach amounted to a repudiation of the contracts." *Mobil*, 530 U.S. at 621, 619 ("[I]f legislation passed by Congress and signed by the President is not a 'statement by the obligor,' it is difficult to imagine what would constitute such a statement."). Thus, the legislation did not constitute an immediate failure to perform under the contracts, but rather a statement of the government's intent to breach the contracts in the future – a classic anticipatory repudiation.[15] This was true even though the legislation left no doubt that the government would not comply with its obligations under the contracts. *See id.* at 611-12, 618.[16]

This Court thus recognized the critical distinction between the *enactment* of legislation by Congress, which amounts to only an anticipatory repudiation of affected

[15] The Court's conclusion that the legislation constituted a repudiation of the contracts at issue, as opposed to a full breach, was key to its holding that the remedy of restitution was available to the contractors. *Id.* at 608.

[16] A "repudiation" is no different from an "anticipatory repudiation." *See* Restatement (Second) of Contracts § 250 ("repudiation" defined as a "statement . . . that the obligor will commit a breach"), *quoted in Mobil*, 530 U.S. at 608; Black's Law Dictionary 1306 (7th ed. 1999) ("repudiation" defined as "words or actions that indicate an intention not to perform the contract in the future; a threatened breach of contract").

contracts, and the later *implementation* of that legislation by the contracting agency, which can result in an actual breach. Other courts have reached the same conclusion, both before and after *Mobil* was decided. *See Schism v. United States*, 239 F.3d 1280, 1290 (Fed. Cir. 2001); *Far West Fed. Bank v. Office of Thrift Supervision*, 119 F.3d 1358, 1365 (9th Cir. 1997) (quoting Restatement § 253); *Stone Forrest Indus. v. United States*, 973 F.2d 1548, 1552 (Fed. Cir. 1993); *Alaska Pulp Corp.*, 48 Fed. Cl. at 659 (legislation constituted a statement of "prospective nonperformance" and implementation by agency resulted in an actual breach); *Plaintiffs in Winstar-Related Cases*, 37 Fed. Cl. at 183 (applying this Court's decision in *Winstar* to hold that "FIRREA was essentially a legally binding forecast of a future breach" and thus "falls well within the definition of an anticipatory repudiation.").

The Federal Circuit's holding that ELIHPA constituted an immediate breach of Petitioners' contracts cannot be squared with this precedent.[17] Just as the contracts in *Mobil* obligated the government to approve proper exploration plans submitted by the contractors, the contracts here obligated the FmHA to approve prepayment requests submitted by the owners. And just as the legislation in *Mobil* announced that the government would not approve exploration plans according to the terms of the contracts at issue, ELIHPA announced that the government would not approve prepayment requests in accordance with Petitioners' contracts. In both cases, the government's legislative act of placing extra-contractual conditions on its future obligations amounted to a repudiation of the contracts, which would ripen into an actual breach only when the time for performance by the agency arrives.

[17] Although *Mobil* was decided after this case was fully briefed to the Federal Circuit in *Franconia*, Petitioners notified the court of the decision pursuant to Fed. R. App. P. 28(j). The Federal Circuit, however, failed to discuss or even reference the case in its decision.

If this were a dispute between private parties, there would be no question as to how these principles apply. The law is clear that a party's statement that it will not honor the terms of an option contained in a contract constitutes an anticipatory repudiation, such that the option-holder need not bring suit until after it attempts to exercise the option and the repudiating party fails to perform by accepting the tender. *See Holm v. CalEnergy Co.*, 229 F.3d 1157, 2000 WL 975177 at *1-2 (9th Cir. 2000) (table case); *Hermanowski v. Acton Corp.*, 580 F. Supp. 140, 143 (E.D.N.Y. 1983), *aff'd in relevant part*, 729 F.2d 921 (2d Cir. 1984); *Rossi v. Oristian*, 376 N.Y.S.2d 295, 297 (N.Y. App. Div. 1975) (a claim for breach of a stock option contract "which provides that plaintiff might exercise the option at any time, presents a situation where the statute of limitations does not commence to run until the person granted the option demands the stock").

This conclusion is mandated by the very nature of a contractual option, which vests the option-holder with the right to choose at which point during the promised period it wishes to exercise the option. A contrary rule allowing the limitations period to commence upon the defendant's repudiation "would permit the defendant to select the date of breach and thus rob the plaintiff of the value of his option." *Hermanowski*, 580 F. Supp. at 143; *see also Fullington v. M. Penn Phillips Co.*, 395 P.2d 124 (Ore. 1964) (the "very privilege" for which an option holder bargains is "the assurance that he will have the entire option period in which to make his decision").

The result should be no different here. Petitioners' contracts granted them the option to prepay their mortgages at any time that they desired during their fifty-year mortgage terms. As a result, the statute of limitations on Petitioners' contract claims did not begin to run until each owner attempted to prepay and the government failed to perform by accepting each owner's tender of prepayment. The Federal Circuit's contrary holding that every Section 515

owner affected by ELIHPA was required to file suit within six years after enactment of the statute, regardless of whether they attempted or even desired to prepay during that window of time, improperly permitted the government, rather than Petitioners, to set the date of breach. In granting this power to the government, the court exempted it from standard principles of anticipatory repudiation.

C. The Federal Circuit Created Contract Rules Applicable Only To The Government In Holding That The FmHA Had No Affirmative Obligation To Accept Prepayment Requests Made By Owners.

The Federal Circuit attempted to avoid the force of this precedent by holding that the prepayment option of Petitioners' contracts imposed no performance obligation on the government, other than an amorphous duty to "continue to allow" owners to prepay. App. A10. The court found that, although Petitioners had the right to prepay their mortgages at any time, the government had no reciprocal duty to accept such prepayments when tendered by owners. *Id.* (finding that the "prepayment provision did not require any performance on the part of the government"). By thus relieving the government of any performance under the contracts, the court could hold that the statute of limitations on Petitioners' contract claims accrued when the government, by passing ELIHPA, ceased keeping its promise to "continue to allow" owners to prepay.

The court's analysis of the parties' respective obligations under the contracts is difficult to understand and harder to justify. Indeed, The terms of the contracts, the governing statutes and regulations, and the applicable case law all make clear what would go without saying if this were a dispute between private parties: that the government had not only a duty to *allow* owners to prepay, but also an affirmative duty to *accept* prepayment requests when made by owners.

Petitioners' contracts state that prepayments "may *be made* at any time" (emphasis added). This clause necessarily encompasses both a right on the part of owners to submit prepayment requests *and* a reciprocal obligation on the part of the government to accept such requests when made. Any other interpretation would render the contracts illusory: absent a government obligation to accept prepayment, the owners' contractual right to prepay would be meaningless. *Mobil*, 530 U.S. at 620 (finding government consideration of plans submitted by contractors to be a "necessary reciprocal obligation" without which the contracts would be rendered "illusory"); *see also Winstar*, 518 U.S. at 921 (Scalia, J., concurring) (government contracts should not be read in a manner that renders government obligations "illusory").

The statutes and regulations governing the Section 515 program confirm that the government holds an obligation to accept prepayment requests made by owners and thereupon return the owners' security (*i.e.*, the property). Both before and after ELIHPA was enacted, the government uniformly recognized its obligation to "accept" prepayment requests.[18] The regulations in effect when Petitioners entered into their contracts also illustrate that the government's duty entails, not only an obligation to accept the owner's tender of prepayment, but also to complete a litany of tasks necessary to process the final payment, release the security, and permit the owner to exit the program.[19] None of these provisions

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[18] *See* Pub. L. No. 96-153, § 503(b), 93 Stat. 1134 (1979), *codified at* 42 U.S.C. § 1472(c)(1),(2) (describing when Secretary "may not *accept* an offer to prepay" and when Secretary "shall *accept* such offer"); 42 U.S.C. § 1472(c)(4)(A),(5)(A) (setting forth agency procedures "before *accepting* any offer to prepay," when agency "may *accept* the offer to prepay," and when it "may not *accept*" any such offer); 7 C.F.R. § 1965.90(b) (1987) (outlining when agency "will *accept* prepayment" and describing agency procedures "upon *acceptance* of the offer to prepay") (emphases added).

[19] 7 C.F.R. § 1965.90(e) (1983) (outlining procedures for final payment and release); *id.* § 1866.2 (1983) (authorizing County Supervisor to execute the necessary releases to return the security to the borrower); *id.* § 1866.3

would make any sense unless the government actually was obligated to "accept" prepayment offers from owners.[20]

Finally, the court's holding that the prepayment clause "did not require any performance on the part of the government" yet again defies ordinary contract principles. Cases involving contractual option provisions consistently hold that once an option-holder exercises its option, the other party has a duty to perform by accepting the tender. *Holm*, 2000 WL 975177 at *1 ("obligation" to sell stock arose when option-holder "tendered the option price"); *Saewitz v. Epstein*, 6 F.Supp.2d 151, 157 (N.D.N.Y. 1998) ("the actual exercise of an option contract by the optionee is the performance of a condition precedent to the optionor's duty to perform") (citing 4 Corbin, CONTRACTS § 264 (1951)); *see also Lucente v. IBM Corp.*, 146 F.Supp.2d 298, 309 (S.D.N.Y. 2001) (option-holder "has sole power to decide when (or if) the optionor must perform"). Here, too, the government was obligated to perform by accepting prepayment if and when each owner tendered a prepayment request, and then releasing the security held by the government.

By finding that the contracts obligated the government to do no more than simply "continue to allow" owners to prepay, the court was able to hold that the only promise the government made under the contracts was to keep its promise. *See* App. A10; *see also id.* at A31. This reasoning, if generally applied, would write the doctrine of anticipatory repudiation out of the law, in that any statement by a party

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(1983) (detailing procedures for the county office to follow in handling final payment and delivering of documents to the borrower).

[20] In fact, the Federal Circuit held in *Greenbrier*, with respect to the sections of ELIHPA applicable to HUD, that the statute does not *disallow* owners from prepaying, but rather imposes conditions on the agency's ability to *accept* requests to prepay. 193 F.3d at 1357 (holding that "neither statute denies an owner the ability to prepay its mortgage loan; rather, both statutes provide that an owner may prepay, albeit in accordance with a plan of action approved by the Secretary").

of its intention not to perform under a contract could be converted into a breach of the duty to "keep the promise,"[21] so that the statute of limitations would begin to run immediately when the statement is made. Fortunately, the law of anticipatory repudiation avoids such absurd results by providing that the limitations period commences only when the repudiating party actually fails to perform. *See supra* at 17, 20.

II. The Federal Circuit Defied This Court's Precedent By Holding That Petitioners' Taking Claims Accrued Upon The Enactment Of Legislation That Expressly Left Open The Possibility That Petitioners Would Be Permitted To Use Their Properties As They Desired.

A. The Legislation At Issue Demands An "As Applied" Takings Analysis.

This Court has long held that a taking claim based on a statute or regulation that allows for a discretionary agency decision on the scope of permissible use of the property at issue is not ripe for review until the agency renders such a decision. *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2458 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 735-39 (1997); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985). Thus, where federal legislation regulates the use of property but provides an escape hatch permitting the agency to exempt certain property from its requirements, a takings claim is not ripe until the agency applies the legislation to the property in question. Otherwise, the agency's exercise of the discretion afforded to it under the statute to determine

[21] Indeed, the notion of a promise not to repudiate is merely a legal fiction, since no such promise is ever expressly made. *See* 5 Corbin, CONTRACTS § 1053 (1964) ("A forbearance to repudiate is never specifically promised."). Remarkably, the Federal Circuit converted this legal fiction into the government's only duty under the contracts.

whether the owner will be permitted to use the property as desired would be undermined.

In *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981), for example, owners of coal mining lands alleged that the "mere enactment" of the Surface Mining Control and Reclamation Act effected a taking of their properties. Noting that the statute did not "categorically prohibit" the owner's intended use of the property, the Court held that the owners' taking claim was unripe. *Id.* at 297. The Court added that its holding did not preclude the owners from arguing that the statute "as applied" to their property resulted in a taking. *Id.* at 297 n.40; *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985) (holding that the government's assertion of jurisdiction over wetlands did not in and of itself amount to a taking because under the permitting scheme created, "permission may be granted, leaving the landowner free to use the property as desired").[22]

The application of this precedent to the statute at issue is clear-cut. ELIHPA provides that prepayment requests may be accepted without any restrictions when the Secretary of Agriculture "determines that housing opportunities of minorities will not be materially affected as a result of the prepayment" and that "there is an adequate supply of safe, decent, and affordable rental housing within the market area of the housing and related facilities and sufficient actions have been taken to ensure that the rental housing will be made available to each tenant upon displacement." 42

[22] The Courts of Appeal uniformly have recognized these principles and applied them in a variety of contexts. *See, e.g., Gulf Power Co. v. FCC*, 208 F.3d 1263, 1271-72 (11th Cir. 2000); *Gilbert v. Cambridge*, 932 F.2d 51, 55-57 (1st Cir. 1991) (claim unripe where scheme created by ordinance left open possibility "that landlords may be granted leave to use their property as they wish"); *cf. National Adver. Co. v. Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991) (taking claim accrued upon enactment of ordnance that demanded "immediate compliance without exception").

U.S.C. § 1472(c)(5)(G)(ii) (App. A89). If the Secretary makes these determinations in his or her discretion, the restrictions imposed by ELIHPA do not apply and the owner will be permitted to terminate its participation in the program.[23]

Thus, there can be no doubt, under the clear precedent of this Court, that Petitioners' taking claims did *not* accrue upon the "mere enactment" of ELIHPA. Because the legislation grants FmHA the discretion to grant prepayment requests without restrictions and thereby permit owners to use their properties as they desire in certain circumstances, Petitioners' taking claims present "as-applied" takings that could become ripe for review only upon implementation of the new requirements by the agency. As such, Petitioners' taking claims did not accrue until that time.[24]

Remarkably, the Federal Circuit recognized as much in a recent case involving a similar housing program that was impacted by a different section of ELIHPA. In *Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999), owners of low-income housing regulated by the Department of Housing

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[23] Regulations issued under the statute similarly provide that "[i]n certain instances, prepayment may be approved" without any conditions imposed on the owner. 7 C.F.R. § 1965.215(c). In particular, "prepayment may be accepted without restrictions" where, among other things, "there is no longer a need for the housing." *Id.* § 1965.215(c)(3),(iii). App. A92-94.

[24] It nearly goes without saying that Petitioners' taking claims could not have *accrued* until they became *ripe* for review. *Levald, Inc. v. Palm Dessert*, 998 F.2d 680, 687 (9th Cir. 1993) ("Determining when the cause of action accrued is merely the corollary to the ripeness inquiry."); *Biddison v. Chicago*, 921 F.2d 724, 728-29 (7th Cir. 1991) (holding that "a taking claim accrues at the same time that it ripens"); *Norco Construction v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986) (holding that "the same considerations that render a claim premature prevent accrual of a claim for limitations purposes"); *Plaintiffs in Winstar-Related Cases v. United States*, 37 Fed. Cl. 174, 182 (1997) ("For a cause of action to accrue and the statute of limitations to run, the claim must be ripe. Common sense, as much as case law, dictates this maxim, for the alternative would lead plaintiffs into a conundrum in which their claims could be time-barred before even becoming amenable to judicial resolution.").

and Urban Development ("HUD") challenged provisions of ELIHPA and a 1990 statute that restricted their right to prepay their mortgages. Observing that the legislation "expressly granted [HUD] authority to approve prepayment proposals" in some instances, the Federal Circuit held that the taking claims before it were unripe because none of the owners had alleged that they sought HUD's approval. *Id.* at 1358-59. Thus, while the Federal Circuit held that the taking claims of the HUD owners in *Greenbrier* were filed too early, it held that the materially indistinguishable taking claims of the FmHA owners in *Franconia* were filed too late. There is no basis for the Federal Circuit's decision to follow this Court's precedent in *Greenbrier* and then ignore it in *Franconia*.[25]

B. The Decision Below Sidesteps This Court's Precedent By Ignoring The Language Of The Statute And Misstating Petitioners' Claims.

The Federal Circuit was able to ignore these firmly entrenched principles of takings law only by turning a blind eye to the terms of the statute. In particular, the court disregarded the provisions of the statute that permit FmHA to accept prepayment requests without restriction where it determines, among other things, that there is no longer a need for the housing. By reading this exception out of the terms of the statute, the court was able to treat Petitioners' claims as asserting only a facial taking. Had the court heeded the fact that the statute permits prepayment without restriction in some cases, it would have had no choice but to analyze Petitioners' taking claims on an as-applied basis.[26]

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[25] The court did not discuss the *Greenbrier* decision or explain why its holding was not controlling in this case. The only similarity between the two cases is that the plaintiffs' claims were dismissed in both.

[26] While the court did not use the phrase "facial taking" *per se*, it held that the statute "took away and conclusively abolished" Petitioners' property interests upon its enactment. App. A14.

The Federal Circuit overlooked not only the terms of the statute and its own precedent, but also the substance of Petitioners' allegations. Petitioners alleged that the government's conduct effected a taking of their properties as of the date that Petitioners actually would have terminated their participation in the program but for the restrictions imposed by the legislation.[27] Thus, Petitioners alleged that the agency's *application* of the legislation, and not its mere *enactment*, effected a taking.

Moreover, even if Petitioners had not clearly alleged an as-applied taking of their properties, the Federal Circuit still would have been bound by the nature of the statute to employ an as-applied analysis. In cases where a facial taking claim is precluded by the fact that the statute does not categorically prohibit the owner's desired use of the property, the proper inquiry is whether the claim is ripe under an as-applied analysis. *See, e.g., Hodel*, 452 U.S. at 295-97 & n.40; *Pennell v. San Jose*, 485 U.S. 1, 9-10 (1988); *Greenbrier*, 193 F.3d at 1358-59 (rejecting facial taking claim and then proceeding to as-applied taking analysis); *see also Riverside Bayview Homes, Inc.*, 474 U.S. at 126-27 (1985). In this case, however, the Federal Circuit ignored the language of the statute, applied only a facial taking analysis, and concluded that the claims are time-barred.

The court's analysis is not saved by its characterization of Petitioners' claims as alleging a taking of their contractual prepayment right. App. A14. First, the notion that the property interest upon which Petitioners base their taking claim is an "unfettered right to prepay" finds no source in

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[27] *See* App. A132, A155 ("As of the date of Government performance required by each contract entered into between defendant and the plaintiffs, defendant's conduct constitutes a taking of plaintiffs' properties for public use . . ."); App. A132, A154 (identifying the "date of Government performance" as "the date that each plaintiff would terminate its contract but for the Government's repudiation"); App. A157-58 (statement of Petitioner that she did not suffer any damages until the agency denied her request to prepay her mortgag

Petitioners' pleadings. Rather, the record makes clear that Petitioners, as title owners of the land and buildings at issue, assert a taking of their state-created real estate interests.[28] Second, as the Federal Circuit recognized in *Greenbrier*, 193 F.3d at 1356-59, even if Petitioners alleged solely a taking of their contract right to prepay, the possibility that prepayment requests may be accepted without restrictions in some cases precluded the court from limiting its inquiry to whether the enactment of the statute constituted a taking.

The Federal Circuit in effect held that Petitioners – and, by extension, every owner in the Section 515 program – should have filed their claims by February 1994 (six years after passage of ELIHPA), regardless of whether they had any intention of terminating their participation in the program by that time. The holding thus creates a new accrual standard for taking claims, providing that a statute can effect a taking before it has any impact on the use of the property at issue. As a result, the decision creates a conundrum for other property owners. Previously, owners like Petitioners would have been compelled by the precedent of this Court to refrain from filing suit until (1) they decided to terminate their participation in the program, and (2) the agency determined that the owner could not, at that time, meet the statutory requirements for doing so. Under the holding in *Franconia*, however, owners facing similar circumstances now will be forced to file suit prematurely in order to avoid dismissal of their claims for filing too late.[29]

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[28] *See* App. A129, 151 (alleging that the government effected "a taking of plaintiffs' *properties* for public use" by, among other things, "requiring plaintiffs to house low-income tenants") (emphasis added). Petitioners' interests in their properties include the right to economically productive use and enjoyment, the right to exclusive possession, and the rights to transfer, devise, and dispose of their properties.

[29] Yet if they do so, they may face dismissal of their claims for filing too early, under the ripeness doctrine, based on *Greenbrier* and this Court's precedent – a veritable Catch-22. *See Bayou des Familles Development Corp.*

III. The Decision Below Creates Unworkable And Illogical Rules Governing The Accrual Of Claims Against The Government.

If permitted to stand, the Federal Circuit's holding will create unjust and unmanageable results for parties and the courts. Take for example a typical owner who entered into the program in 1979 and who, after twenty years, was financially able to prepay its mortgage in 1999. Assuming that the conditions for prepaying without restrictions could not be met at that time, the agency would deny the owner's prepayment request. If the owner then desired to file suit against the government for its failure to honor the terms of the contract, or for an improper taking, the owner would find that its claims had accrued eleven years earlier in 1988 and became time-barred five years earlier in 1994. The decision below thus would compel this owner to file suit by 1994, long before its taking claim became ripe, indeed, well before it even had any desire to exercise its prepayment option, and, consequently, before it suffered any actual damages. The law should not require such bizarre results.

CONCLUSION

This Court should grant certiorari in this case to determine, where the government attempts to modify its contracts through legislation, when the statute of limitations under the Tucker Act begins to run.

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v. United States, 130 F.3d 1034, 1037-38 (Fed. Cir. 1997) (observing that the government "uses the ripeness doctrine as both a sword and a shield"). Indeed, if Petitioners had brought their taking claims immediately upon enactment of ELIHPA, the government undoubtedly would have challenged those claims as unripe, given the possibility of unrestricted prepayment under the statute. Surely, the Takings Clause should not be the subject of such gamesmanship. As this Court has stated, "[w]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . ." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

September 10, 2001

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APPENDIX

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United States Court of Appeals for the Federal Circuit

99-5123

FRANCONIA ASSOCIATES, DAVID HODGES, SR. C/O HODGES DEVELOPMENT CORP., JOANNE M. HODGES, R.C. GETTY APARTMENTS, R.C. MO APARTMENTS, R.C. PIERRE APARTMENTS, R.C. SPRINGS APARTMENTS, SCENIC VALLEY ASSOCIATES, VALLEY ASSOCIATES, DUBLIN PLAZA, INC., EVERGREEN MANOR ASSOCIATES, FOX RIDGE PHASE II, MARILYN GRAHAM, GREENWAY OF ALTOONA ASSOCIATES, PHASE I, GREENWAY OF NEWTON ASSOCIATES, PHASE I, PHOEBE J. PERRI, PINE NEEDLES APARTMENTS, PRAIRIE VILLAGE OF ALTOONA ASSOCIATES, PRAIRIE VILLAGE OF GRIMES ASSOCIATES, PRAIRIE VILLAGE OF HUXLEY ASSOCIATES, PRAIRIE VILLAGE OF LAPORTE CITY ASSOCIATES, PRAIRIE VILLAGE OF SLATER ASSOCIATES, PRAIRIE VILLAGE OF STATE CENTER ASSOCIATES, TIMBERBROOK PROPERTIES and BRIAN E. WELLS,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: February 15, 2001

Before MAYER, Chief Judge, NEWMANN, and SCHALL, Circuit Judges.

SCHALL, Circuit Judge.

Appellants are owners of low income rental housing units financed by mortgage loans from the Farmers Home Administration of the United States Department of Agriculture ("FmHA").[1] The loans were made pursuant to section 515 of the National Housing Act of 1949, Pub. L. No. 87-723, § 4(b), 76 Stat. 671 (1962) (codified as amended at 42 U.S.C. § 1485 (1994)) ("National Housing Act"), and provided funding for low income housing in rural areas. In exchange for a low interest mortgage loan, each of the appellants agreed to restrictions on the use of the property that was subject to the mortgage and on the investment return that could be enjoyed from the property. However, under their original agreements with FmHA, appellants had the option of prepaying their loans at any time, thereby ending the restrictions.

In 1988 and 1992, respectively, Congress enacted the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1877 (1988) (codified as amended in relevant part at 42 U.S.C. § 1472(c) (1988)) ("ELIHPA"), and the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3681, 3841 (1992) (codified as amended in relevant part at 42 U.S.C. § 1472(c) (1994)) (the "1992 legislation"). On May 30, 1997, appellants filed suit in the United States Court of Federal Claims. In their complaint appellants alleged that, by restricting their ability to prepay their FmHA loans, ELIHPA and the 1992 legislation had constituted a breach of their contracts with FmHA and had amounted to a taking of their property, in violation of the Fifth Amendment to the Constitution.

[1] The agency formerly known as the Farmers Home Administration has undergone several name changes, and is now known as the Rural Housing Service. As used herein, the term "FmHA" includes the Farmers Home Administration and its successor agencies.

The government moved to dismiss appellants' breach of contract claims for lack of jurisdiction, asserting that the claims had accrued more than six years prior to the date the suit was filed and therefore were barred by the six year statute of limitations set forth in 28 U.S.C. § 2501 (1994). The Court of Federal Claims agreed and dismissed appellants' breach of contract claims. It also sua sponte dismissed their takings claims. Appellants appeal the dismissal of their suit. Because we conclude that appellants' causes of action accrued in 1988 when ELIHPA was enacted, which was more than six years before appellants filed suit, we affirm the Court of Federal Claims' dismissal of their action.

BACKGROUND

I.

Appellants' loans had terms of up to 50 years. In exchange for their loans, appellants promised to accept only eligible persons as tenants at their properties, to charge rents no higher than those permitted by FmHA regulations, to restrict the returns on their initial capital contributions, and to maintain certain cash reserves. Appellants all entered into loan agreements with FmHA prior to December 21, 1979[2]

Under the section 515 program, in addition to a loan agreement, each borrower's contract with FmHA was based upon a promissory note and a real estate mortgage. The note and mortgage were expressly referenced in the loan agreement. The note included an "escape hatch," whereby the owner could convert the property to market rate housing if the loan evidenced by the note was paid in full. Thus, each promissory note contained the following provision:

[2] Some of the plaintiffs before the Court of Federal Claims entered into loan agreements after December 21, 1979. Those claims remain before that court. Only the pre-December 21, 1979 contracts are at issue in this appeal.

"Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of the Borrower." This provision made it possible for appellants to prepay their loans at any time and then convert their property from low income to more profitable market-rate housing without first obtaining the permission of FmHA.

By the late 1970's many property owners had begun to exercise their prepayment options, thereby reducing the amount of available section 515 housing. In response, Congress passed the Housing and Community Development Amendments of 1979, Pub. L. No. 96-153, § 503, 93-Stat. 1134 (1979) (codified as amended in relevant part at 42 U.S.C. § 1472 (1982)) (the "1979 legislation"). The 1979 legislation, which amended the National Housing Act, prohibited FmHA from accepting prepayment of any section 515 loan made before or after the date of enactment of the statute unless the owner agreed to maintain the low income status of the housing for at least 15 years from the date of the loan. FmHA could waive this requirement only if it determined that the need for low income housing in the relevant area was satisfied.

Reaction to the 1979 legislation, however, persuaded Congress to further amend the National Housing Act in 1980 to eliminate the retroactive application of the 1979 legislation. The Housing and Community Development Act of 1980, Pub. L. No. 96-399, § 514, 94 Stat. 1671 (1980) (codified as amended in relevant part at 42 U.S.C. §1472 (1994)), restored to pre-1979 section 515 borrowers, such as appellants, the right to prepay their mortgage loans at any time. The statute left the 1979 legislation's restrictions in place for loan transactions arising after the 1979 legislation.

Six years later, the continued short supply of low income housing prompted Congress to act again. Starting in October of 1986 and continuing through 1988, it enacted a series of moratoriums on loan prepayments. See H.R. Rep. No. 100-122(I) at 55 (1987), reprinted in 1987 U.S.C.C.A.N. 3317,

3369. Before the last moratorium expired, Congress passed ELIHPA, which was enacted February 5, 1988, to amend the National Housing Act to permanently maintain a steady supply of low income housing. ELIHPA contained multiple provisions affecting different programs that supplied low income housing to the public. Only Subtitle C of Title II, "Rural Rental Housing Displacement Prevention," pertains to appellants. § 241, 101 Stat 1886-90. The other provisions of Title II deal with Changes to Department of Housing and Urban Development ("HUD")-insured housing and other measures to preserve low income housing. Subtitle C imposes restrictions on prepayments of section 515 mortgages that originated before December 21, 1979. One restriction, codified in 42 U.S.C. § 1472(c)(4)(A) (1988), requires that before FmHA can accept a prepayment, it must "make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities for not less than the 20-year period beginning on the date on which the agreement is executed." If, after this "reasonable period," no agreement has been entered into, FmHA must require the owner to sell the housing to a nonprofit organization or public agency for a fair market value. 42 U.S.C. § 1472(c)(5)(A)(i) (1988). Only if no offer to buy is made within 180 days may FmHA accept prepayment. 42 U.S.C. § 1472(c)(5)(A)(ii) (1988). ELIHPA placed "those owners of projects placed in service prior to 1979 on the same playing field as those post 1979 projects who are required by law to keep their units low-income for 20 years." H.R. Rep. No. 100-122(I) at 55, reprinted in 1987 U.S.C.C.A.N at 3371. The portion of ELIHPA that governed HUD-insured loans was temporary, with an express two year time limit. § 203, 101 Stat. 1878 ("Effective upon the expiration of the 2-year period beginning on the date of enactment of this Act – (1) subtitles B and D [dealing with HUD-insured loans] are repealed; and (2) each provision of

law amended by subtitle B or D is amended to read as it would without such amendment.").

Four years after ELIHPA, Congress passed the 1992 legislation. This legislation amended the National Housing Act to apply the prepayment restrictions of ELIHPA to section 515 loans made after December 21,1979. 42 U.S.C. § 1472(c)(4)(A) (1994).

II.

As noted above, appellants filed suit in the Court of Federal Claims on May 30, 1997. In Count One of their complaint, they asserted that the 1992 legislation "anticipatorily repudiated the contract between the defendant and each of the plaintiffs." According to appellants, the government's anticipatory repudiation had deprived, and would deprive, appellants of their right to prepay and terminate their loans at will. In Count Two of the complaint, appellants alleged that the repudiation of this contract right had amounted to a taking under the Fifth Amendment, for which they sought compensation.

In due course, the government moved to dismiss claims that involved pre-1979 loans, on the grounds that the statute of limitations had run as to those claims. The government maintained that it was ELIHPA that had affected the rights of the pre-1979 borrowers, not the 1992 legislation. The government argued that when the 1988 legislation was enacted, no other event needed to occur in order for the pre-1979 owners to bring suit. The 1992 legislation, according to the government, did nothing to alter the contracts of the pre-1979 borrowers.

Appellants countered with a motion for summary judgment on their breach of contract claims, asking the court to rule that the 1992 legislation constituted an anticipatory repudiation of the prepayment option, a material term of the loan contracts. Because the government's performance

obligation under the contracts was to accept prepayment upon request by a borrower, appellants argued, the legislation was a repudiation by the government, a statement that it would not perform its future contractual obligations. According to appellants, under the doctrine of anticipatory repudiation the statute of limitations did not begin to run with the repudiation. Rather, appellants contended, they were entitled to defer suit until performance under their contracts was due or until they elected to treat the repudiation as a breach, neither of which, they argued, occurred in 1988.

The Court of Federal Claims granted the government's motion. In doing so, it held that appellants' breach of contract claims accrued upon the effective date of the regulations implementing ELIHPA, May 23, 1988. Franconia Assoc. v. United States; 43 Fed. Cl. 702, 709 (1999). Because appellants did not file suit until May of 1997, the court determined that their claims were barred by the six year statute of limitations set forth in 28 U.S.C. § 2501. The court accepted the government's contention that ELIHPA alone affected the pre-1979 borrowers' contractual rights, rejecting the notion that, as far as appellants were concerned, it was only a temporary measure.

The court rejected appellants' anticipatory repudiation argument because it concluded that the 1988 legislation constituted an actual breach, not merely a repudiation, of the loan contracts. The court reasoned that the government's obligation under the contracts was not to accept prepayment upon request, but rather to allow the borrowers to prepay at any time. Under this reading of the contracts, once the government permanently prohibited prepayment through ELIHPA, no action on the part of the appellants was necessary for a breach of contract claim to accrue, the court determined.

Finally, although the government did not seek dismissal of appellants' takings claims in Count Two of the complaint,

the court sua sponte held that those claims too were barred by the six year statute of limitations. The court applied the same reasoning as it had applied to the breach of contract claims and found that the takings claims accrued on the effective date of the regulations implementing ELIHPA, May 23, 1988. This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) (1994).

DISCUSSION

I.

A suit against the government in the Court of Federal Claims is barred as untimely "unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (1994). The six year statute of limitations acts as an "express limitation on the Tucker Act's waiver of sovereign immunity." Hart v. United States, 910 F.2d 815, 817 (Fed. Cir. 1998). For purposes of the statute of limitations, a cause of action against the United States accrues "when all events have occurred which fix the government's liability." Kinsey v. United States, 852 F.2d 556, 557 (Fed. Cir. 1988) (quoting Oceanic Steamship Co. v. United States, 165 Ct. Cl. 217, 225 (1964)) (determining liability in a breach of contract claim); see also Seldovia Native Ass'n, Inc. v. United States, 144 F.3d 769, 774 (Fed. Cir. 1998) (determining liability in a takings claim).

In challenging the dismissal of their complaint, appellants make three arguments. First, they contend that the Court of Federal Claims erred because their causes of action did not accrue upon enactment of the 1988 statute. Rather, appellants assert, each borrowers cause of action could accrue only on the date on which FmHA refused a prepayment by the borrower, and ELIHPA did not constitute such a refusal. Appellants' first argument on appeal is premised upon the proposition that FmHA's obligation

under the loan contracts was to accept prepayment rather than allow prepayment, an obligation that could only be triggered by an attempt to prepay. Appellants argue that, under these circumstances, ELIHPA only amounted to an anticipatory repudiation of the government's obligation with respect to prepayment of the loan contracts. Consequently, each borrower had the option of either bringing suit based upon ELIHPA or of waiting until FmHA refused a prepayment request. Appellants' second argument is that even if the government's obligation under the loan contracts was to allow prepayment, it was not ELIHPA, but rather the 1992 legislation that breached that obligation, the reason being that the restrictions on prepayment contained in ELIHPA were only temporary. Third, appellants contend that the Court of Federal Claims erred in holding that their takings claims accrued at the same time as their breach of contract claims.

We are not persuaded by appellants' arguments; we hold that appellants' breach of contract and takings claims both accrued when ELIHPA was enacted on February 5, 1988. Therefore, the claims are time barred because suit was not brought until more than six years later, in May of 1997. We consider first appellants' breach of contract claims.

II.

A claim against the United States first accrues when the government's liability is determined. See Kinsey, 852 F.2d at 557. To determine whether, at some point, the government's liability with respect to appellants' breach of contract claims became "fixed," we first must determine the precise nature of FmHA's obligation under its loan contracts with appellants. As noted above, the contract provision that gave each appellant the right to prepay its loan from FmHA was contained in the promissory note evidencing the appellant's indebtedness: "Prepayments of scheduled installments, or

any portion thereof, may be made at any time at the option of the Borrower." This provision gave appellants an unfettered right to prepay their loans at any time. In addition, the note's prepayment provision did not require any performance on the part of the government because it constituted an unconditional promise on the part of FmHA to allow borrowers to prepay their loans, an obligation which extended for the life of the loan. Thus, under the original terms of the various loan contracts, appellants were allowed to prepay their indebtedness at any time. "[A] breach of contract is a failure to perform a contractual duty when it is due." Trauma Serv. Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997). FmHA's contractual duty in this case was to continue to allow borrowers the unfettered right to prepay their loans at any time. If that continuing duty was breached, the breach occurred immediately upon enactment of ELIPHA because, by its terms, ELIPHA took away the borrowers' unfettered right of prepayment. We thus reject appellants' argument that their breach of contract claims could not accrue until they sought to prepay their loans.

Appellants are not aided by their anticipatory repudiation argument. "An anticipatory repudiation occurs when an obligor communicates to an obligee that he will commit a breach in the future . . . . In such a situation, the normal rule is that the statute of limitations begins to run from the date of performance specified in the contract unless the obligee elects to sue earlier for anticipatory repudiation." Kinsey, 852 F.2d at 558. In other words, if the enactment of ELIHPA was not a breach, but simply an act of anticipatory repudiation, then appellants' claims did not accrue until some subsequent action by the government brought about an actual breach, although appellants had the right to bring suit immediately upon the government's repudiation of its obligation under the loan contracts. The doctrine of anticipatory repudiation does not apply in this case, however, because, the enactment of ELIHPA constituted an

alleged breach, rather than just a repudiation, of the obligation to allow prepayment of the FmHA loans at any time. The government contracted to allow borrowers the unfettered right to prepay their loans and breached that promise, if at all, through the enactment of ELIHPA. The statute of limitations began to run at the time of breach, when ELIHPA was enacted on February 5, 1988.

Our holding today is consistent with our decision in Alder Terrace v. United States, 161 F.3d 1372 (Fed. Cir. 1998). The plaintiff in Alder Terrace entered into a contract with HUD to construct a housing project named "Alder Terrace." The contract was pursuant to section 221(d)(3) of the National Housing Act, 12 U.S.C. §§ 1715l(d)(3), 1715z-1. To finance the project, the plaintiff incurred indebtedness to a private lender that was represented by a promissory note, the repayment of which was insured by HUD. The note generally provided that it could not be prepaid prior to its final maturity date without the approval of HUD. However an additional provision of the note gave the plaintiff the right to prepay its indebtedness without HUD's approval anytime after 20 years from the date on which HUD finally endorsed the note for purposes of insurance. HUD endorsed the plaintiff's note on January 5, 1969. Thus, the plaintiff was entitled to prepay the note anytime after January 5, 1989.

On August 13, 1996, the plaintiff filed suit in the Court of Federal Claims. In its action it alleged that provisions of ELIHPA that placed restrictions on its ability to prepay its indebtedness breached its prior agreement entitling it to prepay its HUD-insured loan after 20 years. Alternatively, the plaintiff claimed that the enactment of ELIHPA constituted a taking of its property, entitling it to compensation under the Takings Clause of the Fifth Amendment. The Court of Federal Claims dismissed the complaint for lack of jurisdiction on the ground that the plaintiff's action was barred by the six-year statute of limitations. On appeal, we affirmed. Starting from the

premise that the plaintiff's suit was barred unless its cause of action accrued after August 13, 1990, we held that the suit was barred because both the date of ELIHPA's enactment (February 5, 1988) and the twenty-year prepayment date (January 5, 1989), the first date upon which the plaintiff was prevented from prepaying, occurred prior to August 13, 1990. We held that the claim accrued at the later of 20 years from contract origination or the enactment of ELIHPA. Id. at 1377. In other words, ELIHPA constituted a breach of contract by the government only if the plaintiff had an unfettered prepayment right when ELIHPA was enacted. Similarly, in this case appellants' claims accrued at the later of when appellants were eligible to prepay or the enactment of ELIHPA. Here, appellants had unrestricted prepayment rights from the dates of their loans. Thus, the enactment of ELIHPA was the only event that prevented appellants from exercising their express contractual rights to prepay. See also Adriadne Fin. Serv. v. United States, 133 F.3d 874, 879 (Fed. Cir. 1998) ("The government's liability was fixed when it refused to allow use of the asset it promised.").[3]

III.

Appellants' alternative argument that it was the 1992 legislation, rather than ELIHPA, that caused their breach of contract claims to accrue is unavailing. As discussed above, the government's alleged breach occurred when ELIPHA prohibited FmHA from allowing prepayments. In other words, the government breached its duty to appellants, if at

[3] The Court of Federal Claims held that the government breached its obligation, if at all, on May 23, 1988, the effective date of regulations implementing ELIHPA. However, we find that any breach would have occurred earlier, with the enactment of ELIHPA on February 5, 1988. The statutory command of ELIHPA, not its regulations, eliminated the allowance of prepayments. See Alder Terrace, 161 F.3d at 1378 ("The fact that the final regulations had not yet been promulgated in no sense lessened the restrictions on the Developer's prepayment right.").

all, with the passing of ELIHPA in 1988. Appellants argue, however, that language in the statute prohibits the 1988 legislation from serving as the date of breach because the elimination of prepayment rights was only temporary. In the findings and purpose section of ELIHPA, Congress stated that "interim measures are needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants." Pub. L. No. 101-242, § 202, 101 Stat. at 1878. However, while this language indicates that parts of ELIHPA were "interim measures," the section relating to FmHA loans was wholly permanent. In contrast, the restriction on HUD-insured mortgage prepayments did have a "sunset provision" pursuant to which the terms of ELIHPA applicable to HUD-insured loans were to expire after two years. Pub. L. No. 101-242, § 203, 101 Stat at 1878. There is no similar language to indicate that the restrictions on FmHA loan prepayments were anything but permanent as to pre-1979 borrowers.[4]

IV.

Finally, appellants argue that, even in the absence of anticipatory repudiation on the part of the government, they still have a valid takings claim. They contend that the application of the statute of limitations to a takings claim requires an analysis of evidence specific to each claim. According to appellants, in this case, a takings claim only becomes ripe for an individual owner when he either has

[4] The 1992 legislation impacted only post December 21, 1979 borrowers. The legislation required that the language of ELIPHA be modified to strike the words "before December 21, 1979," and substitute "prior to the date of enactment of the Department of Housing and Urban Development Reform Act of 1989." Pub. L. No. 102550, § 712, 106 Stat at 3841. This amendment only affected borrowers whose loan contracts were made after December 21, 1979, and before passage of the Reform Act of 1989. The 1992 legislation made those loan contracts subject to the same requirements of ELI PHA as the pre-December 21, 1979 loan contracts.

offered to prepay his mortgage loan and his offer has been rejected, or when he shows that such an attempt would be futile. Appellants contend that because the court did not analyze evidence specific to each claim, the court erred in dismissing all of the appellants' takings claims. We disagree. The Fifth Amendment of the United States Constitution ensures that the government cannot appropriate private property for public use without just compensation. The government's liability for a takings claim becomes fixed when the property at issue is taken. Seldovia, 144 F.3d at 774.

Contract rights are a form of property that may be appropriated by the government. United States Trust Co. of N.Y. v. N.J., 431 U.S. 1, 19 n.16 (1977); see also Greenbrier v. United States, 193 F.3d 1348, 1356 (Fed. Cir. 1999). Thus, each appellant's contract prepayment right can be property for Fifth Amendment purposes. The appellants' unfettered right to prepay their FmHA loans at any time was eliminated by the government with the passage of ELIHPA because ELIHPA prohibited FmHA from allowing unrestricted prepayments. The statute thus took away and conclusively abolished a material contract right. Because appellants brought this suit in May of 1997, more than six years after ELIHPA effected an appropriation of their contract right, their takings claims are barred by the statute of limitations.

CONCLUSION

For the foregoing reasons, the decision of the Court of Federal Claims is

AFFIRMED.

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

00-5094

GRASS VALLEY TERRACE, JEFFERSON COMMONS, MARGORIE W. KASSNER, EILEEN KOTHE, NRCB LIMITED PARTNERSHIP, PETERS, WILLIAMS & KUBOTA, PINE NEEDLE APARTMENTS LIMITED PARTNERSHIP, RIPON MANOR, RURAL COMMUNITY BUILDERS, BEATRICE SCHMIDTBAUER, RICHARD SCHMIDTBAUER, THE HIGHLANDS and WATERLOO GREEN,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Court of Federal Claims

In CASE NO(S). 98-CV-726

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED. See Fed. Cir. R. 36

Per Curiam (NEWMAN, Circuit Judge, ARCHER, Senior Circuit Judge, and BRYSON, Circuit Judge).

ENTERED BY ORDER OF THE COURT

DATED: MAY 17 2001 /s/
Jan Horbaly, Clerk

In the United States Court of Federal Claims

No. 97-381C

(Filed May 6, 1999)

* *

FRANCONIA ASSOCIATES, et al.

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Emergency Low Income Housing Preservation Act (ELIHPA); statute of limitations; summary judgment; anticipatory repudiation; breach of contract; unmistakability doctrine.

* *

Jeff H. Eckland, Minneapolis, Minnesota, attorney of record for plaintiffs.

Mark L. Josephs, Washington, D.C., with whom was *Assistant Attorney General Frank W. Hunger,* for defendant.

OPINION

REGINALD W. GIBSON, *Senior Judge*:

INTRODUCTION

In this case, property owners who received low interest loans from the Farmers' Home Administration, in exchange for providing low-income rental housing in rural areas, have filed suit against the government alleging that the

government breached the loan agreements and, as a result, took their property without just compensation. These wrongs allegedly occurred when Congress passed legislation (i.e., 1988 and 1992) that made prepayment of their loans significantly more difficult, whereas their original loan agreements had granted borrowers an unfettered prepayment right allowing them to terminate the contracts *at any time*. The government responds that of the forty-three (43) contracts at issue, thirty-four (34) are barred by the statute of limitations. 28 U.S.C. § 2501. On the other hand, the plaintiffs seek summary judgment on their breach of contract claim.

FACTS

The thirty-one (31) plaintiffs here at bar have entered into loan agreements with the Farmers' Home Administration (FmHA), United States Department of Agriculture,[1] to provide rental housing for low- and moderate-income persons in rural areas. These agreements were made under the authorization of §§ 515 and 521 of the Housing Act of 1949, and all the agreements were entered into prior to December 15, 1989. 42 U.S.C. §§ 1485, 1490a. Under these contracts, the FmHA makes or insures loans to finance the construction of rural rental housing units in exchange for which property owners agree to restrictions on the use of their property. The use restrictions include: (i) to accept only low- or moderate-income persons as tenants; (ii) to charge no higher rents than those permitted by the FmHA; (iii) to restrict their investment returns to a fixed percentage

[1] The Secretary of Agriculture, pursuant to Congressional authorization in 1994, has established a successor agency to the Farmers Home Administration known as the Rural Housing and Community Development Services (RHCDS). In 1996, the RHCDS changed its name to Rural Housing Service (RHS). In this opinion, we will refer to the FmHA to include the Farmers Home Administration and its successor agencies.

of their initial capital contributions; and (iv) to maintain certain cash reserves. 7 C.F.R. §§ 1944.215. These restrictions apply only until the indebtedness under the promissory notes is satisfied. The contract to provide low-income housing is documented by a promissory note, a loan agreement, and a real estate mortgage.

The FmHA included the following provision in the promissory notes executed by the owners as part of the contracts: "*Prepayments* of scheduled installments, or any portion thereof, may be made *at any time* at the option of Borrower." Def.'s Mot. Dismiss App. at 4 (emphasis added). This generous prepayment provision was only applicable, however, to owners entering into agreements *before* December 21, 1979 (pre-1979 loans). Plaintiffs entering into loans *after* December 1979 (post-1979 loans) were required to maintain the low-income affordability of the housing for a 15- or 20-year period following the date of the loan, *after which they were allowed to prepay their loans*. Furthermore, promissory notes contained another provision, as follows: "This Note shall be subject to the present regulations of the Farmers Home Administration and to its future regulations not inconsistent with the express provisions hereof." Def's Mot. Dismiss App. at 4.

Two subsequent statutes, in 1988 and 1992, affected plaintiffs' loans. First, in 1988, Congress amended the Housing Act by passing the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA). Pub. L. No. 100-242, 101 Stat. 1815, 1877 (1988), codified as amended at 42 U.S.C. § 1472(c). As to pre-1979 loans, ELIHPA considerably restricted prepayment entitlement by adding limiting procedures for prepayment. Specifically, ELIHPA restricted the prepayment option by: (i) requiring the Secretary to make "reasonable efforts" to enter into an agreement with the borrower to extend the low income use of the housing for not less than a 20-year period starting from the date of the agreement; and (ii) if such an agreement cannot be entered

into, the Secretary shall *require* the borrower to sell the housing to a qualified nonprofit organization at a fair market value as determined by two independent appraisers. Pub. L. No. 100-242, § 241, 101 Stat. 1815, 1886 (1988) (prior to 1992 amendment). The purpose of the 1988 amendments was to place "those owners of projects placed in service prior to 1979 on the same playing field as those *post*-1979 projects who are *required* by law to keep their units low-income for 20 years." H.R. Rep. No. 100-122(1) at 55, *reprinted* in 1987 U.S.C.C.A.N. at 3317. In the "Findings" section of the 1988 legislation, Congress included this statement:

> [U]ntil the Congress can act on recommendations that will emerge from this review [a proposed major review of alternative responses to loss of affordable housing], *interim measures* are needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants.

Pub. L. No. 100-242, § 202(a)(10), 101 Stat. at 1878 (1988) (emphasis added). Finally, the legislation also included a "sunset" provision which provided that subtitles B and D of the Act would be repealed on February 5, 1990. *Id.* at § 203(a). Subtitle B deals with prepayment of mortgages insured with the Department of Housing and Urban Development (HUD) under the National Housing Act, 12 U.S.C. § 1701 *et seq.*, and subtitle D deals with other prepayments not affecting those made on loans for low-income rural housing. 101 Stat. at 1878, 1890. Consequently, loans entered into with the FmHA are not subject to ELIHPA's sunset provision.

Several years later, in 1992, Congress enacted the Housing and Community Development Act of 1992. Pub. L. No. 102-550 § 712, 106 Stat. 3681, 3841 (1992) (codified in relevant part at 42 U.S.C. § 1472(c)). This Act amended the same section of the Housing Act, as was amended by the

1988 legislation, by extending the prepayment restrictions that had previously only applied to pre-1979 loans to all loans made *prior* to 1989. *Id.* Additionally, it allowed the Secretary to offer an additional incentive of allowing owners to receive rents in excess of those normally allowed to loan recipients in order to induce owners to enter into agreements extending the low-income use of the housing. 42 U.S.C. § 1472(c)(4)(B)(vi).

Plaintiffs initially filed this action on May 30, 1997, with an amended complaint filed on July 28, 1997. They allege two counts, to wit, breach of contract and a Fifth Amendment taking. For the breach of contract claim, they assert that the *1992 legislation* constituted an anticipatory repudiation of the contract between the government and each of the plaintiffs. Plaintiffs allege that the government's anticipatory repudiation constitutes a breach of their contracts "as of the date of Government performance required by each contract, i.e., the date that each plaintiff would terminate its contract but for the Government's repudiation." Compl. ¶ 51. On the taking claim, the plaintiffs claim that "defendant's conduct" constitutes a taking of their property, as of the date of government performance *required* by each contract. Compl. ¶ 54.

Subsequent to the filing of the complaint, the government filed a motion to dismiss the claims, based on *pre*-1979 loans, on the grounds that the statute of limitations has expired as to those claims. The government contends that it was ELIHPA, enacted in 1988, rather than the 1992 legislation, that affected prepayment rights on *pre*-1979 loan agreements, thus any breach of the pre-1979 loan agreements occurred on the *date of enactment* of ELIHPA, which was February 5, 1988. At that time, nothing else had to happen for plaintiffs holding *pre*-1979 loans to bring a breach of contract claim, thus plaintiffs' claims accrued at that date. Because the pre-1979 claims, here at bar, were not filed until

May 30, 1997, which is not within six years of accrual, those claims on this record are time barred.

Plaintiffs then filed a motion for partial summary judgment seeking a ruling from this court on their first count, breach of contract through anticipatory repudiation. Specifically, plaintiffs wish this court to rule that the prepayment options were a material contract term, the government could not subject this contract term to inconsistent regulation, and that the 1992 legislation constituted an anticipatory repudiation of the contract because it restricted an owner's future exercise of the prepayment option.

The task before this court is, first, to determine whether *pre*-1979 loanholders' contract claims must be dismissed from the suit because their actions are time-barred. Even if all pre-1979 contracts are dismissed, however, we must still determine whether, as to post-1979 contracts, the government, by legislation, breached such contracts.

DISCUSSION

A. MOTION TO DISMISS–STATUTE OF LIMITATIONS

The government seeks to dismiss the plaintiffs' claims on the grounds of lack of subject matter jurisdiction pursuant to the Rules of the Court of Federal Claims (RCFC) 12(b)(1) because their claims violate the statute of limitations. Suits against the United States are subject to a six-year statute of limitations. 28 U.S.C. § 2501. The six-year time bar on actions against the United States is "a jurisdictional requirement attached by Congress as a condition on the government's waiver of sovereign immunity." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988). Because the statute of limitations affects this court's subject matter jurisdiction–rather than being an affirmative defense–the requirement is strictly construed and under no circumstances may it be waived by the court. *Laughlin v.*

United States, 22 Cl. Ct. 85, 99 (1990), *aff'd*, 975 F.2d 869 (Fed. Cir. 1992); *Catellus Dev. Corp. v. United States*, 31 Fed. Cl. 399, 404 (1994). If the motion to dismiss for lack of subject matter jurisdiction challenges the truth of the jurisdictional *facts* in the complaint, the court may look beyond the pleadings to consider all available evidence in order to determine jurisdiction. *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991). Similarly, if the court has doubts regarding jurisdiction, it may look at all the evidence presented to satisfy itself regarding the jurisdictional facts. *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461 (Fed. Cir. 1998). Accordingly, mindful of plaintiffs' burden to establish the jurisdiction of this court as well as our own duty to ensure the legitimacy of our jurisdiction, we consider all the evidence presented for this court's consideration in evaluating the government's motion to dismiss.

To prove that their claim is not time-barred, plaintiffs must show that their claim first accrued within six years of the filing of the complaint. *LaMear v. United States*, 9 Cl. Ct. 562, 569 (1986), *aff'd*, 809 F.2d 789 (Fed. Cir. 1986). Under this threshold analysis, a claim first accrues when "all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action." *Hopland*, 855 F.2d at 1577. In other words, a claim has accrued when the last event transpires that gives plaintiffs a cause of action. For breach of contract claims, the claim generally accrues at the time of breach. *Brighton Village Associates v. United States*, 52 F.2d 1056, 1060 (Fed. Cir. 1995).

1. The Accrual

Plaintiffs allege that the government breached the loan agreements by enacting legislation that deprived them of the prepayment option as it was expressly promised in the contract. They describe the government's action in enacting the legislation as an anticipatory repudiation of the contract. Secondly, they allege that the government has taken their

property without just compensation, in violation of the Fifth Amendment, when it passed the legislation because the mere passing of the legislation, *ipso facto*, deprives plaintiffs of their vested right to prepay the loan and to lease their property on the open market. According to plaintiffs, therefore, the time of accrual for *both* the breach and the takings claims occurs on the date government performance is required by the contract. Government performance, plaintiffs argue, occurs when the plaintiffs "would terminate its contract but for the Government's repudiation." Compl. ¶ 51. In other words, plaintiffs are arguing that the claims will accrue on a future speculative date when the property owners will seek to prepay, but because of the above legislation, the government will refuse the owners' proffered prepayment.

The government moves to dismiss both the breach and the takings causes of action as to those claims that are based on loans executed *before* December 21, 1979. Such claims, the government contends, are barred by the six-year statute of limitations. According to the government, ELIHPA, enacted in 1988, was *the* legislation that restricted the prepayment option for pre-1979 loans. Therefore, any breach of contract accrued in 1988. The government makes no contentions as to the actual accrual date of plaintiffs' takings claims. Therefore, we must determine for ourselves–because of our responsibility to ensure subject matter jurisdiction–whether the takings claim is time-barred. *See RHI Holdings, supra*, 142 F.3d at 1461.

Plaintiffs' first count, breach of contract, is defended against the running of the statute of limitations on the doctrine of anticipatory repudiation. Citing the *Winstar-Related* cases, plaintiffs claim that, under the law of anticipatory repudiation, the plaintiffs may choose to sue at the earlier of: i) the anticipatory repudiation, or ii) the breach. A plaintiff may postpone filing suit and not be penalized due to the running of the statute of limitations because the

limitations period will not begin to run until an actual breach has occurred. *Winstar-Related Cases*, 37 Fed. Cl. 174, 183 (1997). The anticipatory repudiation here at bar, according to plaintiffs, occurred in 1992, when the later legislation was passed. This, they claim, marks the *earliest* time at which their claim could have accrued. Thus, six years hence, i.e., in 1998, would not bar the 1997 complaint filed here. The earlier 1988 ELIHPA legislation, plaintiffs contend, was only an "interim" measure such that plaintiffs were reasonable in waiting for Congress to enact a permanent solution before filing suit. For this proposition, they rely on *Anaheim Gardens*, decided in this court, which stated that the 1988 legislation was merely a temporary measure such that property owners "would not have been unreasonable to have forborne litigation until after they had learned what sort of 'permanent solution' Congress would devise." *Anaheim Gardens v. United States*, 33 Fed. Cl. 773, 776 (1995). Under the doctrine of anticipatory repudiation, a prerequisite to a legal finding of *de jure* repudiation is a "positive, unconditional and unequivocal declaration of fixed purpose not to perform a contract in any event or at any time." *Dingley v. Older*, 117 U.S. 490, 502 (1986). According to plaintiffs the 1988 legislation did not contain the necessary unequivocal declaration of repudiation. On the other hand, the 1992 legislation was such of an unconditional and permanent nature as to be an anticipatory repudiation. Thus, according to plaintiffs, the 1992 legislation, and not the 1988 legislation, constitutes the anticipatory repudiation.

Although 1992 marks the earliest, according to plaintiffs, that they could have sued, the statute of limitations does not begin to run until performance by the government becomes due. Here, plaintiffs claim, there is no duty of performance by the government until the time an owner "intends to exercise its termination option." Pl.'s Mot. Summ. J. at 32-33. Thus, if an owner never exercises its option, the government's anticipatory repudiation will never ripen into

a breach of contract. It is unclear from the evidence before this court whether any plaintiffs have tried to exercise their prepayment right. Indeed, plaintiffs argue that an attempt to prepay is not required because it would be futile–given the statutes passed by Congress–and the law does not require a plaintiff to do that which is futile. Plaintiffs arguments can be summarized as asserting that the six-year statute of limitations period commences at the later of: (i) the anticipatory repudiation occurring through the 1992 legislation, or (ii) the date upon which plaintiffs, but for the government's repudiation, would have exercised their prepayment options. We take each of these contentions in turn, i.e., (i) whether the 1988 or the 1992 legislation constitutes a permanent repudiation, thus marking the earliest point at which the plaintiffs may sue, and (ii) whether, notwithstanding the legislative repudiation, the limitations period does not begin to run until plaintiffs request prepayment.

Plaintiffs' characterization of the 1988 legislation as "interim" is based upon the "Findings and Purpose" section of the legislation. Pub. L. No. 100-242, § 202, 101 Stat. at 1877 (1980). Finding 10 states as follows:

> [U]ntil the Congress can act on recommendations that will emerge from this review, *interim measures* are needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants.

Id. at § 202(a)(10) (emphasis added). This statement, however, cannot be given the weight that plaintiffs ascribe to it. The general rule of statutory interpretation is that statutes, once enacted and "unless explicitly provided to the contrary ... continue in force until abrogated by subsequent action of the legislature." 2 *Sutherland Statutory Construction* § 34.01 (5th ed. 1984). For a statute to be abrogated there must be an

explicit repeal by later legislation, or an implied repeal by a later inconsistent provision, or, if the statute states conditions for repeal, the happening of the condition. *Id.* at § 34.02-34.03. Even if the words "interim measures" in the preamble to the 1988 statute were meant to characterize the duration of the legislation, rather than being an expression of the motivation behind the legislation, we must nevertheless accept the 1988 legislation as a fully-enforceable *de jure* statute until later repealed. Thus, the 1988 ELIHPA is a *permanent* repudiation because it is a "positive, unconditional and unequivocal declaration of fixed purpose" to restrict borrowers' ability to prepay their loans.

The permanent nature of the 1988 legislation as it affects prepayment of FmHA loans is also evidenced by contrasting the way it treats FmHA loans as opposed to HUD loans. The 1988 legislation provided a "sunset provision"[2] for that part of the legislation affecting the National Housing Act (i.e., HUD) loans. The sunset provision provides for the expiration of two subtitles, subtitles B and D of the Act, pertaining to HUD loans, after a two-year period from the legislation's enactment. Pub. L. No. 101-242 § 203(a) (1988). Subtitle C, entitled "Rural Rental Housing Displacement Prevention," was not included in this sunset provision. Because Congress has provided for the expiration of some sections of the Act but not others, we must conclude that Congress intended that those sections of the Act pertaining to the prepayment of rural housing loans be permanent legislation, at least until later legislation expressly repealed it.

This conclusion does *not* run contrary to our holding in *Anaheim Gardens.* In *Anaheim Gardens,* this court had concluded that "ELIHPA [the 1988 legislation] was enacted expressly as a temporary measure." 33 Fed. Cl. at 776. But in

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[2] A sunset provision in a statute specifies a date upon which the statute expires. Congress must take positive steps to allow the law to continue in existence by a certain date or it will cease to exist. *Black's Law Dictionary* (6th ed. 1990).

that case, the court was analyzing loan agreements made with HUD, rather than the FmHA. As stated earlier, the 1988 Act provided for a sunset provision in which restrictions on prepayments for the HUD loans would expire in two years. As to HUD loans, the court opined that ELIHPA was a temporary measure, later mentioning that the two-year "moratorium on prepayments" gave Congress time to devise a more permanent solution. *Id.* Because the case before us involves FmHA loans to which the sunset provision did not apply, the *Anaheim Gardens* characterization of the 1988 legislation is inapplicable. In short, this is a different case.

We are also mindful that our conclusion runs somewhat contrary to the Congressional declaration in the "Findings and Purpose" section of the Act that "interim measures are needed." First, we note that Congress did provide for "interim" measures with regard to HUD loans. Those measures expired after a two-year period. The comment that "interim measures" are needed does not necessarily apply to all the measures that Congress enacted in the 1988 legislation. Second, the "Findings and Purpose" section is very similar to "Policy" sections in other legislation. Under canons of statutory construction, policy sections are not part of the substantive portion of the statute and "may not be used to create ambiguity." 1A *Sutherland Statutory Construction* § 20.12. Thus, to the extent that the characterization of "interim" can be applied to the FmHA loan provisions, this statement cannot change the substantive statute. As we have stated above, a statute is permanent until later expressly repealed. As of the time of the enactment of the 1988 legislation, the legislation was permanent, and the breach of contract, if any, occurred at that date, because the government's liability was fixed at that time.

For a more exact date as to when a claim accrued, we must consult the enacting regulations. *See Winstar-Related Cases,* 37 Fed. Cl. at 183-184 ("[u]ntil the actual

implementation [of the legislation], there occurred no invasion of a legal right.") The 1988 legislation required the issuance of "final regulations" to carry out its measures. 101 Stat. at 1889. Furthermore, the 1988 legislation required that these regulations be issued within 60 days of the enactment of the legislation, with the regulations to take effect no later than 45 days from the date of issuance. *Id.* To allow the agency to promulgate such regulations in this short time period without running afoul of the Administrative Procedure Act's requirements for notice and comment on proposed rules, Congress allowed the agency to promulgate "emergency" rules. *Id.* Pursuant to this authorization, the agency issued "interim" rules without notice and comment on April 22, 1988 (53 Fed. Reg. 13,244 (1988)), with an effective date of May 23, 1988. The FmHA solicited public comment on a proposed final rule (55 Fed. Reg. 29,601 (1990)), but it never promulgated a final rule. Plaintiffs seem to argue that the fact that the FmHA only issued interim "emergency basis" rules rather than "final regulations," strengthens its view that the 1988 legislation was itself "interim." That is not the case. As we have previously illustrated, the 1988 legislation was in fact permanent. It also authorized the FmHA to issue emergency regulations because it required the FmHA to promulgate the regulations within a short time of the legislation's enactment. The nature of the regulations does not reflect upon the permanence of the enacting statute. Finally, the FmHA was working on a "final rule" and permitted public comment on its proposed rule. From the above facts, we can state that the plaintiffs' claim for breach of contract, if there was a breach, accrued on May 23, 1988, when the FmHA's regulations, issued pursuant to the enacting legislation, became effective. At that date, the government's liability was then fixed such that plaintiffs could have immediately brought suit. Because this suit was not filed until May 30, 1997, it was not brought within six years of accrual. And we so hold.

2. Anticipatory Repudiation

Plaintiffs argue in the alternative that, notwithstanding which legislation constitutes repudiation, under the anticipatory repudiation doctrine, the statute of limitations does not begin to run, on this record, until the later time for performance under the contract. *Winstar-Related Cases*, 37 Fed. Cl. at 183. As correctly stated by plaintiffs, *when* there has been an anticipatory repudiation, a plaintiff may choose to sue at the *later* of: i) the anticipatory repudiation, or ii) the breach. *Kinsey v. United States*, 852 F.2d 556, 558 (Fed. Cir. 1988). There, determining when the statute of limitations begins to run, however, depends on when a plaintiff chooses to sue. In such case, the time of accrual of a claim, "depends on whether the injured party chooses to treat the anticipatory repudiation as a present breach." Calvin W. Corman, *Limitation of Actions*, § 7.2.1 (1991). For instance, when a plaintiff sues after performance is due by the repudiating party, i.e., after the actual breach, the "statute of limitations commences to run from the time fixed for performance rather than from the earlier date of repudiation." *Id.* But if a plaintiff elects to treat the anticipatory repudiation as a breach, "the accrual date of the cause of action is accelerated from time of performance to the date of such election." *Id.* According to plaintiffs, the statute of limitations is not triggered until performance is due by the government, which plaintiffs contend is when an owner intends to exercise its termination option.

Although plaintiffs have correctly stated the law regarding the running of the statute of limitations in an anticipatory breach situation, we disagree with their characterization of the government's required performance. Plaintiffs argue that the performance required of the government under the prepayment option is to accept a borrower's prepayment. In fact, the performance required of the government under the prepayment option is *to allow*

landowners to prepay, meaning that an actual breach occurred at the time of the 1988 legislation rather than an anticipatory repudiation. In order to understand this conclusion, we must begin our analysis with the loan agreements at issue, focusing our attention on the prepayment option.

The prepayment option for pre-1979 loan agreements–the only agreements at issue in the government's motion to dismiss–is composed of a single sentence. This sentence reads: "Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower." Def.'s Mot. Dismiss App. at 4. A careful reading of this clause reveals that no performance by the government is required–it is merely a promise to allow the borrower to prepay at any time during the life of the loan. No conditions are attached to this promise. The government's performance, if it can be called that, is to keep its promise to allow borrowers an unfettered prepayment right. No further performance was required by the government under the terms of the prepayment clause. Thus the government's performance, in the pre-1979 loan agreements, extends *throughout* the life of the loan, because its promise endures for the life of the loan. In 1988, however, Congress enacted the legislation that withdrew this promise. As of 1988, therefore, borrowers could no longer prepay their contracts without first going through lengthy and onerous procedures. This was clearly in contravention of the government's clear promise to allow an *unfettered* prepayment right. We also note that this conclusion is in full accordance with *Adams v. United States*, a decision in this court on similar facts that held that because ELIHPA barred the FmHA from allowing loanholders to prepay at any time–the performance required of the government–the statute of limitations began to run from the enactment of ELIHPA. 42 Fed. Cl. 463, 473-74 (1998) (Horn, J.). Consequently, a cause of action arose in 1988 for the breach of its promise.

Plaintiffs' contentions that the repudiating legislation constitutes merely an *anticipatory* repudiation of a contractual right are wrong. Anticipatory repudiation occurs when a promisor communicates to a promisee that he will commit a breach in the future. *Kinsey v. United States*, 852 F.2d 556, 558 (Fed. Cir. 1988). As its name implies, *anticipatory* repudiation is made by a promisor *before* his performance is due under the contract. 11 Williston on Contracts § 1312 (3rd ed. 1978), citing *Gold Mining and Water Co. v. Swinerton*, 142 P.2d 22, 27 (Cal. 1943). From this definition, we see that on the facts at bar there is no anticipatory repudiation. The performance required of the government was to keep its promise to allow borrowers an *unfettered* prepayment right; and this promise extended throughout the life of the loan agreements. With the 1988 legislation, the government broke its promise, ending its performance under the contract. Thus, it could not have anticipatorily repudiated because there was no performance due by the government under the contract. The breach thus occurred at the time of the legislation.

The above explanation of the effect of the 1988 legislation on the pre-1979 loan agreements squares with this court's decisions regarding a similar HUD loan. Under the HUD program, property owners were contractually entitled to prepay their loans only after 20 years from the date of their loan agreement. In *Anaheim Gardens*, cited frequently by plaintiffs, this court found that the 1988 legislation breached the contract of HUD borrowers. 33 Fed Cl. at 776. The court found, however, that because the majority of the borrowers had not reached their 20-year anniversary date at the time the 1988 legislation was passed, they could not have suffered any damages. Not until "such date as a plaintiff *might have* exercised the contractual prepayment rights on which the proposed breach claim is based," could the borrowers have suffered damages, such that the last act had occurred to render the government liable. *Id.* Under this reasoning, the court found that the statute of limitations would begin as of

the date of enactment of the 1988 legislation or the 20-year anniversary date of the agreement, whichever was later. *Id.* at 777. The *Anaheim Gardens* decision is consistent with a theory of anticipatory repudiation. In *Anaheim Gardens*, the time for performance by the government when it must allow prepayment-simply had not yet arrived. The HUD borrowers were entitled to treat the 1988 legislation as an anticipatory repudiation because the government's performance was not yet due. Thus they could also have waited to sue for breach of contract when government performance did come due, on the 20-year anniversary date of their loan agreements. In the case at bar, the government had promised the borrowers a prepayment right throughout the life of the loan starting with the inception of the loan. At the time of the 1988 legislation, the government was allowing prepayment, i.e., it was performing its part of the bargain. When the 1988 legislation broke its promise, the repudiation was not anticipatory; rather, it was an actual breach of contract.

Plaintiffs' position also makes little logical sense. They contend that the statute of limitations does not run until plaintiffs attempt to prepay and the government declines the prepayment. Yet plaintiffs also argue that because attempting to prepay is futile-given the repudiating legislation-they are not obliged to prepay in order to bring suit. Plaintiffs cite a Third Circuit case stating that the law, "which is eminently practical, does not require the doing of a vain thing." The cited case, however, is distinguishable, because there the plaintiff filed suit upon the anticipatory repudiation and within the limitations period from that repudiation. *Abdallah v. Abdallah*, 359 F.2d 170, 175 (3d Cir. 1966). When the court used the above-quoted language, it was stating that there was no necessity for the plaintiff to actually induce a breach if he was filing a breach of contract claim based on the repudiation. *Id.* In the case at bar, plaintiffs are essentially arguing that the statute of limitations

has not begun to run, which logically would mean that their claim has *not accrued*. Under an anticipatory repudiation theory, the alleged breach of contract must arise either from an anticipatory repudiation, or an actual breach of contract. The plaintiffs have not alleged any facts indicating that they have sought prepayment and been refused–the acts which under their theory are necessary to constitute a breach of the prepayment provision. Thus if their theory of breach of contract is anticipatory repudiation, their claim must be based upon the 1988 legislative repudiation; it cannot be based upon a breach that has not in fact occurred. Because this claim was not filed until May of 1997, it was not filed within six-years of repudiation and is therefore barred.

3. Accrual of the Takings Claim

Neither party has argued or briefed the issue of whether plaintiffs' takings claims accrues at the same time as the breach of contract claim. This court, nevertheless, can *sua sponte* take up the issue of whether the takings claim also meets this court's statute of limitations. *Celentano v. United States*, 41 Fed. Cl. 596, 606-607 (1998). Indeed, it is our duty to ensure that we have subject matter jurisdiction over the claims before us. In the takings claim, plaintiffs allege that the "defendant's conduct" constitutes a taking of their property, as of the date of government performance required by each contract. There is only one instance of "defendant's conduct" at issue–Congress's change of the prepayment option. As this action is alleged to have constituted a taking, the claim would have accrued at the time of the 1988 legislation, which, as discussed above, was when Congress by law changed the plaintiffs' prepayment rights. The discussion above, relevant to the breach of contract claim, is equally applicable to the takings claim. Therefore, for the same reasons expressed above, this takings claim fails because it was not filed within this court's six-year statute of limitations.

B. SUMMARY JUDGMENT

Plaintiffs seek summary judgment pursuant to RCFC 56(c) which provides for judgment if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." A "genuine dispute" is one in which a reasonable jury, or in this case, a reasonable judge, could return a judgment for the nonmovant. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). The burden is on the moving party both to show that there is no genuine dispute as to any material fact and that it would be entitled to a directed verdict at trial. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In reaching a decision on summary judgment, the court is not to weigh the evidence, nor make credibility assessments, nor seek the truth of the matter. *Anderson*, 477 U.S. at 255. Any doubt as to factual issues must be resolved in favor of the party opposing summary judgment to whom the benefit of all presumptions and inferences run. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Finally, summary disposition is appropriate if there is no genuine dispute over a *material* fact. *Anderson*, 477 U.S. at 248. A material fact is one that might affect the outcome of the suit under the governing substantive law. *Id.*

In a summary judgment motion, the moving party bears the burden of demonstrating that there is no genuine issue of material fact. *Adickes*, 398 U.S. at 157. This burden may be discharged if the moving party demonstrates that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The role of the judge is not to weigh the evidence but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249.

Plaintiffs' partial summary judgment motion in the case at bar requests a judgment on the first count of their

complaint to the effect that the government breached its contracts with plaintiffs when it established regulatory measures inconsistent with a material term of the contracts. The regulations at issue deprive plaintiffs of their contractual right to prepay their indebtedness–thus terminating their contracts–before the expiration date of the 40- or 50-year contracts. In opposition to this motion, the government argues first that the prepayment provision of each contract was not a material term of the contract. Second, the government argues that the allegedly repudiating statute did not absolutely prohibit prepayment so that it does not constitute a breach of the contract. Finally, the government raises the unmistakability doctrine. Under this doctrine, which is a canon of contract construction, a governmental surrender of *sovereign* authority must be expressed in unmistakable terms in the contract. *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986). In the contracts at issue here, the government argues that because plaintiffs cannot show that the government unmistakably surrendered its right to alter the contract through future legislation, the government cannot be subjected to damages for breach of contract. In fact, contends the government, the contract here states just the opposite when the contract included the following provision:

> It is understood and agreed by Borrower that any loan made or insured by the Government will be administered subject to the limitations of the authorizing act of Congress and the related regulations ....

Def's Reply App. at 5. According to the government, Congress's amendment of the authorizing legislation was a contingency agreed upon in the contract, as reflected in the above-quoted language. Because future legislative changes were contemplated under the contract, the government

cannot be liable in damages for breach of contract because of the changes.

The government does not contest any of the material facts that are currently before us.[3] Therefore, we have only to settle the legal issues presented for our consideration. Moreover, if the government's contentions regarding the unmistakability doctrine are correct, i.e., in the loan agreements at issue, the United States government has not surrendered in unmistakable terms its sovereign right to later alter the agreement then the plaintiffs' summary judgment motion fails as a matter of law, *even if* there was a breach of contract through legislation. Therefore, we consider it more prudent to pass on the government's contentions regarding the application of the unmistakability doctrine first. If we find that this doctrine is inapplicable or that an unmistakable promise was made by the government that said contract will not be subject to future contrary legislation, we will then consider secondarily the other issues of law, including breach of contract, that must be addressed before we can resolve plaintiffs' summary judgment motion.

1. Applicability of the Unmistakability Doctrine

The unmistakability doctrine was summed up in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, in which the Supreme Court stated that "sovereign power...

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[3] The only factual issue raised by the government centered around three plaintiffs–the government asserted that it could not find evidence of loan agreements entered into between the FmHA and these three plaintiffs. According to plaintiffs' counsel, the three plaintiffs had entered into pre-1979 loan agreements. Because we have already determined above that those plaintiffs who entered into pre-1979 loan agreements must be dismissed from this suit, the factual dispute over whether these plaintiffs did in fact enter into loan agreements–which the plaintiffs admit are pre-1979 loan agreements–is moot. This factual dispute is therefore not a genuine issue of material fact in plaintiffs' motion for partial summary judgment.

governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." 477 U.S. 41, 52 (1986). In the absence of an unmistakable promise to the contrary, all "contractual arrangements, including those to which a sovereign itself is a party, 'remain *subject to* subsequent legislation' by the sovereign." *Id.* (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982)). The underlying presumption is that contracts with the government will be subject to later contrary legislation unless there is a clear promise otherwise in the contract itself.

The most recent expansive discussion of this doctrine was in the Supreme Court's opinion in *United States v. Winstar Corp.*, 518 U.S. 839 (1996). In *Winstar*, three savings and loans asserted a breach of contract resulting from Congress's enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). Prior to FIRREA, the plaintiff savings and loans had an agreement with the government that granted them favorable accounting treatment if they acquired failing thrifts. *Id.* at 847-48. With the passage of FIRREA, the favorable accounting methods were eliminated. *Id.* at 856-58. As a result, two of the three plaintiffs in *Winstar* were seized and liquidated by the government, while the third plaintiff was forced to engage in a massive recapitalization to stay afloat. *Id.* at 858. They filed a claim for breach of contract asserting that the government, by passing FIRREA, had breached its contractual obligation to accord the thrifts favorable accounting treatment. *Id.*

The Supreme Court decision was, unfortunately, a plurality opinion–although seven justices agreed to the ultimate finding of government liability, there was no majority consensus on the reasoning behind the liability holding, including the scope of the unmistakability doctrine and whether it was applicable to the facts. Justice Souter wrote the plurality opinion of the court, joined by Justices

Stevens, and O'Connor, with Justice Breyer concurring. While holding that the government was liable for breach of contract, the plurality came to this conclusion by finding that the unmistakability doctrine was *inapplicable* to the facts before them because they read the contracts to include a provision shifting *the risk* of future legislation to the government. *Id.* at 880-81. Because these risk-shifting provisions did not prevent Congress from acting in its sovereign capacity to alter the terms of the contract but merely designated who would pay for the changes, the provisions did not implicate Congress's sovereign powers and thus the unmistakability doctrine was simply inapplicable to the contracts. *Id.* Thus, the four plurality justices believed that the unmistakability doctrine was inapplicable on the facts. On the other hand, Justices Scalia, Kennedy, and Thomas believed the doctrine was *applicable* and that an unmistakable promise that the contract would not be subject to later-arising legislation had been made by the government. *Id.* at 921. These three justices thus concurred *in the judgment* finding the government to be liable. Dissenting Justices Rehnquist and Ginsburg found the doctrine to be applicable but found that *no unmistakable promise* had been made, disagreeing with the ultimate judgment against the government. *Id.* at 924-37. Thus a total of five justices agreed on the applicability of the unmistakability doctrine to the facts.

To determine whether we should apply the doctrine to the case at bar, we rely on the fact that a *majority* of justices, five, in the *Winstar* case found the doctrine applicable, even though that holding did not produce the ultimate judgment in the case. The five justices that comprised the dissent and the concurring opinions believed that the plurality had misapplied precedent, which had "not made the availability of these sovereign defenses (as opposed to their validity on the merits) depend upon the nature of the contract at issue." *Id.* at 919. The two dissenters, for instance, believed that the

plurality had essentially restricted the doctrine, contrary to precedent, to situations where plaintiffs either seek (i) injunctive relief to hold the government to its alleged surrender of sovereign authority, or (ii) damages which would be the "equivalent of" an injunction or exemption to a changed law. *Id.* at 926. The five justices agreed that courts could not make distinctions between claims in order to apply the unmistakability doctrine. *Id.* at 919, 926-27. Moreover, the five justices found the unmistakability doctrine applicable even if the contract included a risk-shifting clause as found by the plurality. As stated by the two dissenting justices, the unmistakability doctrine "has a role to play" in determining whether a risk-shifting term was in fact included in the contract. *Id.* at 930. They believed that the unmistakability doctrine was a canon of construction to be used in interpreting all governmental contracts. According to the five justices, the plurality inappropriately interpreted the contract without applying the presumption of the unmistakability doctrine when it determined that the doctrine itself was inapplicable. *Id.* at 920-21, 930.

Because a majority of the justices believed that the unmistakability doctrine must be used in interpreting all governmental contracts, we must understand that to be the controlling holding on the doctrine.[4] We will thus apply the unmistakability doctrine to the case at bar.

[4] The view of the five justices in *Winstar* on the unmistakability doctrine has also been adopted as controlling by the Federal Circuit. *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1578-79 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 2365 (1998). After concluding that the unmistakability doctrine applied on the *Yankee Atomic* facts, the court stated that "this conclusion respects the view of the five justices who stated that the application of the doctrine is unrelated to the nature of the underlying contracts." *Id.*

2. Whether an Unmistakable Promise was Made

Under the unmistakability doctrine, we must first determine whether the contracts between the plaintiffs and the FmHA unmistakably preclude the government from subsequently exercising its sovereign power to alter prepayment rights. *See e.g., Yankee Atomic*, 112 F.3d at 1579. For the reasons outlined below, we hold that the FmHA loan agreements *do not* contain an unmistakable promise precluding the government from exercising its sovereign power to alter the prepayment rights.

The characteristics that make a promise unmistakable have often been described, but such promises are rarely found by the courts. An unmistakable promise has been characterized as having terms that "admit of no other reasonable interpretation." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). Even an ambiguous term of a contract will not be construed as a conveyance or a surrender of sovereign power. *Winstar*, 518 U.S. at 878. An unmistakable promise was, however, found by the three concurring justices in *Winstar*. They found this promise in the nature of the contract. The reason for the contract, the essential quid pro quo, they argued, was that the government was to regulate supervisory goodwill favorably in exchange for the savings and loans' acquisition of the failing thrifts. *Winstar*, 515 U.S. at 921 (J. Scalia, concurring). Thus the contract itself was a promise to regulate favorably–to state that no unmistakable promise was made would be to render the contract an illusory promise. *Id.* (stating that "I do not accept that unmistakability demands that there be a further promise not to go back on the promise to accord favorable regulatory treatment.").

Under the facts of this case, there is no unmistakable language within the prepayment provision that waives the government's right to modify the prepayment terms through future legislation. It simply states that "[p]repayments of scheduled installments, or any portion thereof, may be made

at any time at the option of Borrower." Def.'s Mot. Dismiss App. at 4. Elsewhere in the loan agreement, however, is the following clause: "This Note shall be subject to the present regulations of the Farmers Home Administration and to its future regulations not inconsistent with the express provisions hereof." Def's Mot. Dismiss App. at 4, 9. This is the only clause in the agreement that addresses the effect of future acts on the terms of the agreement. But this clause only refers to future *regulations*, not statutes. Federal regulations stem from federal agencies, and the above clause specifically refers to regulations of the Farmers Home Administration. From the plain words of the contract, we must conclude that this clause protects the contract from subsequent changes by the Farmers Home Administration. We cannot conclude, however, that this protection extends to future changes in law by Congress. Indeed, under the unmistakability doctrine, such an expansion of a contractual clause is prohibited. *See also Parkridge Investors Ltd. v. Farmers Home Administration*, 13 F.3d 1192, 1198 (8th Cir. 1994), *cert. denied*, 511 U.S. 1142 (1994) (an exemption from future *regulations* does not exempt a contract from future acts of Congress). Thus, it cannot be read as an unmistakable promise by the government that it would not later change the terms of the agreement by future legislation.

There is also no unmistakable promise under the *Winstar* concurrence criteria. In the case at bar, the essence of the contract was for the borrower to receive a low-interest loan in exchange for agreeing to rent the property to low-income tenants. Although the prepayment provision was a material term of the contract–it is likely that some property owners might not have entered into the agreements had the prepayment terms been less generous–it was not the reason for the agreement. By definition, a prepayment provision is not going to be the purpose of a loan. Thus, the *Winstar* concurrence's criteria for an unmistakable promise are not met on the facts before us.

Because we find that there is no unmistakable promise by the government in the loan agreements to absolve the contract from further substantive legislation, the government has a defense to the claim that the government breached the loan agreements through subsequent legislation.[5] Therefore, plaintiffs' motion for partial, summary judgment is DENIED.

CONCLUSION

The government's motion to dismiss all claims, premised on breach of contract and takings, based on loans executed *before* December 21, 1979, is hereby GRANTED. Pursuant to RCFC 54(b), inasmuch as there appears to be no just reason for delay, the clerk shall dismiss the claims and enter judgment with respect to all claims based on loans executed *before* December 21, 1979.

Plaintiffs' motion for partial summary judgment on their claim for breach of contract is DENIED because of the unmistakability defense. Therefore, two counts (i.e., breach of contract and a taking) from plaintiffs' complaint remain for trial on the merits as to those plaintiffs whose claims are based on loans executed after December 21, 1979. To the extent that defendant has not filed an answer to any of the surviving claims, it shall do so within twenty (20) days from the date of this opinion. In addition, the parties shall file a joint memorandum within fourteen (14) days from the receipt of this opinion advising the court how they wish to

[5] We need not consider the other defenses raised by the government. These defenses are: (i) that the prepayment provision of each contract was not a material term of the contract; and (ii) that the allegedly repudiating statute did not absolutely prohibit prepayment so that it does not constitute a breach of the contract.

proceed regarding the remaining counts in each surviving claim.

IT IS SO ORDERED.

United States Court of Federal Claims.

GRASS VALLEY TERRACE, a California Limited Partnership, et al., Plaintiffs,

v.

The UNITED STATES, Defendant,

No. 98-726 C.

April 12, 2000.
Reissued for Publication: May 22, 2000.

Jeff H. Eckland, Minneapolis, MN, for plaintiff. William L. Roberts and Mark J. Blando, Minneapolis, MN, of counsel.

Mark L. Josephs, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, for defendant, with whom were David M. Cohen, Director, and David W. Ogden, Acting Assistant Attorney General.

OPINION

DAMICH, Judge.

I. Introduction

In this case, fourteen Plaintiffs, who entered into loan agreements with the Farmers Home Administration (FmHA), United States Department of Agriculture, to provide low-income rural housing, filed suit against the government alleging the government breached its contracts by enacting subsequent legislation that made it substantially more difficult for Plaintiffs to exercise their option to prepay their loans at any time. The Defendant filed a motion to dismiss on the ground that six of the Plaintiffs' claims are barred for lack of subject matter jurisdiction. Plaintiffs filed a motion

for partial summary judgment as to their breach of contract claims (Count I). Plaintiffs claim as damages the value of the increased rents that Plaintiffs believe they could have charged after prepayment, diminution in property value, and costs involved in continuing to comply with the FmHA housing program.

II. Facts

Fourteen Plaintiffs entered into loans with the FmHA to provide rental housing for low- and moderate-income individuals and families in rural areas. These loans were made pursuant to §§ 515 and 521 of the Housing Act of 1949 (codified at 42 U.S.C. § 1485, 1490(a)). All the Plaintiffs entered into their contracts either before December 21, 1979 (pre-1979 contracts); or on or after December 21, 1979, but before December 15, 1989 (post-1979 contracts). The agreement to provide low-income housing consisted of a promissory note, a loan agreement, and a real estate mortgage.

In exchange for low-interest rates on their loans, Plaintiffs in the contracts agreed to numerous restrictions ("the investment return restrictions") on the use of their properties while their loans remained outstanding, including: (1) to accept only eligible low- or moderate-income persons as tenants; (2) to charge rents no higher than those permitted by FmHA; (3) to restrict investment returns to a rate of 8% on their capital contributions; and (4) to maintain certain cash reserves.

FmHA included the following express provisions in the promissory notes executed by the borrowers in the Section 515 program: (1) "Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower" and (2) "This Note shall be subject to the present regulations of the Farmers Home Administration and to its future regulations not inconsistent with the express

provisions hereof" or "This Note shall be subject to the present regulations of the Farmers Home Administration and to its future regulations and provisions hereof." For the pre-1979 Plaintiffs, the loan agreements, by their terms, including the investment return restrictions, continue only so long as the indebtedness under the promissory notes remains unsatisfied.

However, the contracts of Plaintiffs entering into loans with the FmHA on or after December 21, 1979 differed. Post-1979 Plaintiffs were required by the terms of the loan documents to maintain the low-income nature of the housing for a period of 15 or 20 years following the date of the loan.

III. The Legislation

A. Emergency Low Income Housing Preservation Act of 1987 (ELIHPA)

On February 5, 1988, Congress amended the Housing Act by passing the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA). Pub.L. No. 100-242, 101 Stat. 1877 (1988), codified as amended at 42 U.S.C. § 1472(c) ("the 1988 legislation"). This legislation did not terminate the prepayment right of pre-1979 owners,[1] rather it placed a number of restrictions on the exercise of the prepayment option. For example, it required pre-1979 owners who made an offer to prepay, to negotiate an agreement with FmHA to extend the low-income use of their properties for a period of 20 years from the date of the agreement. 42 U.S.C. § 1472(c)(4)(A). In order to encourage owners to extend the low-income use of their properties, various incentives were offered such as increases in the rate of return on investment, reductions on the interest rate on the mortgage loan, additional rental assistance and an equity loan. 42 U.S.C. §

[1] The 1988 legislation did not address the post-1979 owners.

1472(c)(4)(B). If borrowers chose not to extend the low-income use of their properties, borrowers were required to sell the housing to a qualified non-profit organization or public agency at a fair market value as determined by two independent appraisers. 42 U.S.C. § 1472(c)(5)(A).

In order to avoid placing its property for sale, the borrower was required to extend the low-income use of its property for a period of time determined by the Secretary but not less than 20 years from the date of the loan origination. 42 U.S.C. § 1472(c)(5)(G). However, owners were still required to offer to sell the property to qualified non-profits at the end of that period. *Id.* On the other hand, if the Secretary determined that housing opportunities for minorities would not be materially affected as a result of the prepayment and that either (a) tenants would not be displaced; or (b) that there is an adequate supply of affordable rental housing within the market area of the housing, then the prepayment restriction did not apply. *Id.*

B. Housing and Community Development Act of 1992

On October 28, 1992, Congress enacted the Housing and Community Development Act of 1992. Pub.L. No. 102-550 § 712, 106 Stat. 3681, 3841 (1992) (codified in relevant part at 42 U.S.C. § 1472(c)). This legislation amended the 1988 legislation by extending the application of the prepayment provisions to FmHA loans made on or after December 21, 1979, but prior to the date of enactment of the Department of Housing and Urban Development Reform Act of 1989. 42 U.S.C. § 1472(c)(4)(B)(vi). Furthermore, the legislation permitted the Secretary to provide incentives to extend the low income use by allowing owners to receive rent in excess of the amount normally permitted by loan recipients. *Id.*

IV. Procedural History

Plaintiffs commenced this action on September 16, 1998. In Count I, Plaintiffs allege that by enacting the Housing and Community Development Act of 1992, the government anticipatorily repudiated its contract with each of the Plaintiffs. Plaintiffs allege that the anticipatory repudiation constitutes a breach of contract as of the date that each Plaintiff would terminate its contract but for the government's repudiation. In Count II, Plaintiffs claim that Defendant's conduct constitutes a taking of Plaintiffs' properties for public use and requires payment to Plaintiffs of just compensation under the Fifth Amendment to the United States Constitution.

Also on September 16, 1998, Plaintiffs filed a motion for class certification pursuant to Rule 23 of the Rules of the United States Court of Federal Claims. The motion was denied on June 9, 1999.

On January 20, 1999, Defendant filed a motion to dismiss certain of Plaintiffs' claims. Specifically, Defendant seeks the dismissal of breach of contract claims of 6 Plaintiffs holding only "pre-1979" loans, and a portion of the breach of contract claim of one Plaintiff holding one pre-1979 loan.[2] On March 18, 1999, Plaintiffs responded by filing a motion for partial summary judgment with respect to their breach of contract claim (Count I of the complaint) and an opposition to Defendant's motion to dismiss. Oral argument was held.

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[2] On November 10, 1999, the parties filed a joint stipulation with regard to two parties added to this action in July 1999, Baltimore, Ltd. & ABCD Trust. The parties stipulated that Defendant's motion to dismiss and Plaintiffs' motion for partial summary judgment apply to all Plaintiffs, including the two Plaintiffs added after Defendant filed the motion to dismiss. As to the additional Plaintiffs, the parties agree that Baltimore, Ltd., is a post-1979 Plaintiff. The parties disagree as to whether ABCD Trust is a "pre-1979" or "post-1979" Plaintiff.

V. Discussion

A. Motion to Dismiss Certain Claims

1. Standard

Pursuant to Rule 12(b)(1) of the Court of Federal Claims, the Defendant moves to dismiss claims brought by six of the fourteen Plaintiffs for lack of subject matter jurisdiction because the claims violate the statute of limitations. The United States Court of Federal Claims is a court of limited jurisdiction. *Bath Iron Works Corp. v. United States*, 27 Fed.Cl. 114, 122, aff'd, 20 F.3d 1567 (Fed.Cir.1994); *Dynalectron Corp. v. United States*, 4 Cl.Ct. 424, 428, aff'd, 758 F.2d 665 (Fed.Cir.1984). The statute of limitations provides that "every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (1994). If the motion to dismiss for lack of subject matter jurisdiction challenges the truth of the jurisdictional facts in the complaint, the court may look beyond the pleadings to consider all available evidence in order to determine jurisdiction. *Rocovich v. United States*, 933 F.2d 991, 993 (Fed.Cir.1991). Because the statute of limitations is jurisdictional, "plaintiff bears the burden of proving that its action was timely filed." *McDonald v. United States*, 37 Fed.Cl. 110, 113 (1997).

2. Arguments

Defendant argues that the Plaintiffs' breach of contract claims based upon loans executed on or before December 21, 1979, are barred by the statute of limitations. The claims first accrued upon the enactment of ELIHPA on February 5, 1988, and the present action was filed on September 16, 1998, more than six years later. The Defendant contends that ELIHPA

immediately restricted the purported right of Plaintiffs to prepay their mortgages at any time. Therefore, if any breach occurred, it accrued in 1988.

In response, the Plaintiffs first argue that the limitations period does not commence to run upon enactment of the 1988 legislation because this legislation was only temporary. Plaintiffs claim the limitations period commences to run on the enactment of the 1992 legislation or the date on which Defendant, but for its repudiation, would have been required to accept the exercise of a termination option.

In support, Plaintiffs rely on finding (10) in the "Finding and Purpose" section of the legislation. Pub.L. No. 100-242, § 202, 101 Stat. 1815, 1878 (1988). The pertinent finding states, "[U]ntil the Congress can act on recommendations that will emerge from this review, interim measures are needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants." *Id.*

Plaintiffs argue that the language calling for "interim measures" indicates that the provisions relating to FmHA loan holders were only temporary measures thus failing to give notice to Plaintiffs that their so-called "unfettered right" to prepay at any time was permanently altered. Further, Plaintiffs argue that because Congress set the HUD provisions in the 1988 legislation to expire after two years, it was therefore reasonable for the FmHA loan holders to question whether Congress would change the law regarding the pre-1979 contract prepayment provision.

3. Analysis

A claim first accrues for purposes of the statute of limitations when all events have occurred which fix alleged liability of defendant and entitle plaintiff to institute action. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed.Cir.1988). A claim does not accrue unless the claimant knew or should have known that the claim existed.

Jones v. United States, 801 F.2d 1334, 1335 (Fed.Cir.1986). Whether a plaintiff should have been aware of the existence of a claim is an objective test in which "a plaintiff does not have to possess actual knowledge of all relevant facts in order for the cause of action to accrue." *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed.Cir.1995) (citing *Menominee Tribe v. United States*, 726 F.2d 718, 721 (Fed.Cir.1984)).

[3] Plaintiffs incorrectly claim that the 1988 legislation affecting FmHA loans was temporary rather than permanent. First, Plaintiffs place greater emphasis on the "Findings and Purpose" section than is appropriate. The "Findings and Purpose section" is similar to a policy section or preamble. "The policy section like the preamble is available for the clarification of ambiguous provisions of the statute, but may not be used to create ambiguity." 2A Sutherland Stat. Const. § 20.12 (5th Ed.1992 Rev.). "The declaration of policy like the preamble is not part of the substantive portion of the statute." *Id.* It is well settled that "unless explicitly provided to the contrary, statutes continue in force until abrogated by subsequent action of the legislature." *Id.* at § 34.01. "A statute may contain a provision prescribing that it will cease to operate on the happening of a specified event or date." *Id.* Without such a provision, the general rule is that a statute continues in effect indefinitely. *Id.*

[4] The 1988 legislation contains a "sunset" provision in Section 203 which specifically states that two years after the date of enactment of the legislation subtitles B and D are repealed. Pub. Law No. 100-242, § 203, 101 Stat. 1878 (1988). The FmHA provisions at issue in the present case are contained in Subtitle C. There is no indication that the FmHA provisions contained in Subtitle C were temporary. On the contrary, the conference report on ELIHPA stated, "the Farmers Home Administration provisions are amendments to permanent law and are not subject to the sunset provisions in Subtitle A." H. Conf. Rep. No. 100-426, 100th Cong., 1st Sess. 199 (1987), reprinted in 1987 U.S.C.C.A.N. 3458, 3496.

Thus, the legislation contains clear express language providing for the termination of HUD but not FmHA provisions. This Court cannot do what Plaintiffs ask, that is, to use the "Findings and Purpose" section to create ambiguity where none exists. If this Court were to adopt Plaintiffs' reasoning, it would be saying that all legislation is temporary because Congress can always change it. Instead, the law requires us to treat legislation as fully enforceable until it is later repealed by subsequent legislation. As a result, the 1988 enactment of ELIHPA, rather than any other legislation, immediately restricted the Plaintiffs' right to prepay their loans at any time at their option because it placed certain restrictions on prepayment.

Moreover, even though the Federal Circuit in *Alder Terrace* found that ELIHPA was a temporary measure in dealing specifically with HUD loans, the court found that Plaintiff was on notice that the Emergency Act of 1988 and its 1988 interim implementing regulations negated its contractual prepayment right, effective in January 1989. *Alder Terrace v. United States*, 161 F.3d 1372, 1379 (Fed. Cir.1998). In *Alder Terrace*, the plaintiff alleged damages as a result of the failure to allow prepayment according to the contract. *Id.* at 1373. The court held that the plaintiff's claims accrued on its contractual 20-year prepayment date of January 5, 1989. *Id.* at 1379. The Federal Circuit stated, "The fact that the Emergency Act was expressly a temporary measure does not impact our analysis. On January 5, 1989, the Emergency Act was in force and, under the [plaintiff's] analysis, was preventing the [plaintiff] from exercising its prepayment right." *Id.* at 1377.

This reasoning is consistent with *Alder Terrace*. In the case at bar, the pre-1979 loan holders allege that the Defendant breached the contractual right to prepay their loans at any time at their option. Unlike the plaintiffs in *Alder Terrace*, the pre-1979 contract holders were not required to wait 20 years before they could exercise their option to

prepay at any time. Therefore, in this case, immediately upon enactment of the 1988 legislation the pre-1979 loan holders were on notice that they could no longer prepay their loans at any time at their option. According to *Alder Terrace*, the fact that the provisions concerning FmHA were temporary rather than permanent is irrelevant to the analysis. It remains that the 1988 legislation was in force and prevented the pre-1979 loan holders from exercising their prepayment right. Therefore, the claims of the pre-1979 contract holders accrued upon enactment of ELIHPA in 1988, the event that occurred to fix the alleged liability of Defendant, thus enabling Plaintiffs to bring suit.

4. Anticipatory Repudiation

In the alternative, Plaintiffs argue that the 1992 legislation constituted an anticipatory repudiation. Plaintiffs contend that the limitations period as to the claim of any Plaintiff does not commence to run until the date on which Defendant, but for its repudiation, would have been required to accept the exercise of that Plaintiff's termination option. Thus, according to Plaintiffs, acceptance occurs on whatever date in the future Plaintiffs choose to prepay their mortgages.

An anticipatory repudiation occurs when an obligor communicates to an obligee that the obligor will commit a breach in the future. *Kinsey v. United States*, 852 F.2d 556, 558 (Fed.Cir.1988). The aggrieved party is entitled to sue either when the anticipatory repudiation occurs or at the later time for performance under the contract. Calvin W. Corman, Limitation of Actions § 7.2.1 (1991). Generally, the statute of limitations begins to run from the date of performance specified in the contract unless the obligee elects to sue earlier for anticipatory breach. *Kinsey*, 852 F.2d at 558. However, if the breach is "not wholly anticipatory because it involves some contractual nonperformance, the statute of limitations begins to run immediately." *Id.*

This Court finds Plaintiffs' anticipatory repudiation theory unpersuasive. Plaintiffs incorrectly claim that the Defendant, according to the promissory note, is required to accept prepayment from the pre-1979 Plaintiffs. The contract language at issue allows the pre-1979 Plaintiffs to prepay their loans at any time at their option. The prepayment provision in the promissory note states, "Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower." A close examination of the language indicates that the performance required of the Government was to allow the pre-1979 Plaintiffs the option to prepay at any time. Therefore, the enactment of ELIHPA constituted an actual breach rather than an anticipatory repudiation because it immediately altered the right of the pre-1979 loan holders to prepay at any time at their option. The specific contractual nonperformance that occurred was the inability of FmHA, as a result of the 1988 legislation, to allow Plaintiffs to prepay at any time. Thus, Plaintiffs' claim is based on an alleged breach rather than the theory of anticipatory repudiation. The enactment of ELIHPA in 1988 was the event that occurred to fix the alleged liability of Defendant which triggered the statute of limitations. Plaintiffs were on notice that their unqualified right to prepay their loans at any time was breached, if at all, in 1988.

The pre-1979 Plaintiffs are not barred from prepaying their loans. They may still prepay subject to various restrictions imposed by the 1988 legislation. The contractual right that Plaintiffs' claim was breached was the so-called "unfettered right" to prepay their loans at any time at their option.

This reasoning is consistent with other decisions of this court. In *Adams v. United States*, the court stated:

> [T]he performance required by the government was to allow plaintiffs to prepay at any time, thereby

> terminating the low-income affordability restrictions. Because the enactment of ELIHPA legally barred FmHA from allowing plaintiffs to prepay at any time, the statute of limitations began to run from that date [the enactment of ELIHPA].

Adams v. United States, 42 Fed.Cl. 463, 474 (1998). In *Franconia Assocs. v. United States*, the court stated, "The government's performance, if it can be called that, is to keep its promise to allow borrowers an unfettered prepayment right. No further performance was required by the government under the terms of the prepayment clause." *Franconia Assoc. v. United States*, 43 Fed.Cl. 702, 710 (1999).

This reasoning is also consistent with the court in the context of HUD-insured housing programs. In *Anaheim Gardens v. United States*, the court held that the plaintiff's breach of contract claims accrued at either the enactment of ELIHPA or the 20-year anniversary date of the loan, whichever date was later. *Anaheim Gardens v. United States*, 33 Fed.Cl. 773, 777 (1995).[3] In *Anaheim Gardens*, the court did not wait until plaintiffs exercised their option to prepay and the Government had to accept prepayment to begin the statute of limitations. Rather, the court focused on the nature of the contractual right. In *Anaheim Gardens*, they could not prepay without permission until the 20-year anniversary of each of their loans. *Id.* The statute of limitations in *Anaheim Gardens* began to run when plaintiffs were no longer allowed to exercise their option pursuant to their contract. *Id.* This principle applies with equal force to the Plaintiffs in this case. Since the Plaintiffs' right to prepay already existed when ELIHPA was enacted, the legislation breached this right at the time of enactment.

[3] The plaintiffs were permitted to prepay their mortgages with HUD's permission during the first 20 years of the loan. *Anaheim Gardens*, 33 Fed.Cl. at 774. However, after 20 years, the property owners could prepay without HUD's permission. *Id.* ELIPHA and a subsequent statute imposed certain restrictions upon this prepayment provision. *Id.*

Plaintiffs also rely on the "stabilization doctrine" in takings law to support their contention that Plaintiffs should not be penalized for waiting to sue until the 1992 legislation. In *Dickinson*, plaintiff brought a takings claim under the Tucker Act for flooding caused by the Government's construction of a river dam. *United States v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947). The court allowed the party to delay filing the lawsuit until it was determined whether the taking of plaintiff's property by flooding was temporary or permanent. *Id.* at 750, 67 S.Ct. 1382.[4]

The "stabilization doctrine" in takings law has no application to the statute of limitations in this case. The Federal Circuit in *Ariadne Financial Services Pty., Ltd. v. United States*, rejected the application of the doctrine outside of the context of a taking. *Ariadne*, 133 F.3d 874, 879 (Fed.Cir.1998). The court stated: "the *Dickinson* stabilization principle, however, does not apply outside its context. Later cases have essentially confined the stabilization doctrine to the class of flooding cases from which it originated." *Id.*; *See*, e.g., *United States v. Dow*, 357 U.S. 17, 27, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958) ("The expressly limited holding in *Dickinson* was that the statute of limitations did not bar an action under the Tucker Act for a taking by flooding when it was uncertain at what stage in the flooding operation the land had become appropriated to public use.") Nonetheless, even if the Court were to apply the doctrine, the claim in this case is not a "continuing process of physical events." *Dickinson*, 331 U.S. at 749, 67 S.Ct. 1382. Rather, the passage of the 1988

[4] In *Dickinson*, the Supreme Court stated, "All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really taken." *Dickinson*, 331 U.S. at 749, 67 S.Ct. 1382.

legislation constitutes a single event that prevented Plaintiffs from exercising their right to prepay at any time.

Therefore, because the breach of contract claims of Plaintiffs holding loans entered into before December 21, 1979, accrued on February 5, 1988, and this action was filed on September 16, 1998, these Plaintiffs' contract claims are barred by the statute of limitations and are dismissed.

B. Plaintiffs' Motion for Partial Summary Judgment

1. Standard

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Jay v. Secretary*, DHHS, 998 F.2d 979 (Fed.Cir.1993). A fact is material if it might significantly affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The court must resolve any doubts about factual issues in favor of the non- moving party, *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc.*, 145 F.3d 1303, 1307 (Fed.Cir.1998) and draw all reasonable inferences in its favor. See *Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 773 (Fed. Cir.1995).

2. Arguments

Plaintiffs move for partial summary judgment on Count I, the breach of contract claim. This motion concerns Plaintiffs holding post-1979 contracts. Plaintiffs argue that Defendant anticipatorily repudiated the termination option

in contracts entered between Plaintiffs and Defendant by enacting legislation that restricted any owner's future exercise of the termination option. Plaintiff maintains that ELIHPA, the 1992 legislation and the administrative procedures it established are inconsistent with Plaintiffs' termination option for three reasons. First, the legislation does not permit owners to exercise their right at their own option because owners are required to seek Defendant's authorization before any termination option can be exercised. Second, the procedures do not permit owners to exercise any termination option at the time of their own choosing. Third, the procedures place those owners who want to exercise their termination option without any restriction in a position of being compelled to participate in a "forced-sale proceeding" and risk losing their properties entirely.

Plaintiffs also contend that the termination option constitutes a bargained- for element of each Plaintiff's contract with Defendant and not merely a non- binding statement of regulatory policy as it existed when the contract was executed. Plaintiffs maintain that Defendant's inability to perform its contractual obligation that it would not subject Plaintiffs to future inconsistent regulations, makes it liable for breach of contract damages.

In opposition, Defendant raises the unmistakability doctrine. The Defendant argues that even if the prepayment provisions of ELIHPA and the 1992 legislation are inconsistent with the prepayment term so as to otherwise constitute a breach, the unmistakability doctrine bars Plaintiffs' contract claims. Defendant contends that under the contract terms at issue, the FmHA did not unmistakably promise not to subject the loan documents to future legislation.

In contrast, Plaintiffs argue that the applicability of the unmistakability doctrine is dependent upon whether the sovereign acts defense is available. Here, Plaintiffs state that they seek only to enforce Defendant's legal obligation to pay

damages for repudiating its contractual obligation to permit Plaintiffs to exercise their termination option. Therefore, because Plaintiffs do not seek to block the sovereign from exercising its powers to enact legislation, the unmistakability doctrine is inapplicable.

In this case, the Defendant does not raise the sovereign acts doctrine as a defense. However, in response to Plaintiffs' argument, the Defendant contends that the applicability of the unmistakability doctrine does not depend upon the applicability of the sovereign acts doctrine. Defendant argues that the unavailability of one in a given case does not automatically preclude the application of the other. The determination of whether a statute is a public and general act is unrelated to the determination of whether a contract contains language that unmistakably exempts a party from the effects of legislation.

There are no genuine issues of material fact in dispute. Thus, the Court must decide as a matter of law whether the Defendant breached Plaintiffs' contracts by enacting subsequent legislation that altered Plaintiffs' prepayment right.

3. The Unmistakability Doctrine

The first issue is whether the unmistakability doctrine is applicable to the contracts in this case. *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1578 (Fed.Cir.1997). Under this doctrine, which is a canon of contract construction, a governmental surrender of sovereign authority must be expressed in unmistakable terms in the contract. *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986). "Contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." *Id.* (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982)). Thus, "a

contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power." *United States v. Winstar Corp.*, 518 U.S. 839, 878, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996). "The underlying presumption is that contracts with the government will be subject to later contrary legislation unless there is a clear promise otherwise in the contract itself." *Franconia Assoc. v. United States*, 43 Fed.Cl. 702, 713 (1999).

Recently, the Supreme Court in *Winstar* engaged in an extensive discussion of the unmistakability doctrine. In *Winstar*, the Supreme Court held that the United States was liable for breach of contract arising out of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). *Winstar*, 518 U.S. at 839, 116 S.Ct. 2432. The Supreme Court found that three savings and loans institutions had entered into contracts with the Government whereby they agreed to acquire failing thrifts in return for favorable accounting treatment. *Id.* at 848, 116 S.Ct. 2432. The favorable accounting treatment allowed the savings and loans institutions to count "supervisory goodwill" towards their capitalization requirements. *Id.* at 850-51, 116 S.Ct. 2432. However, the enactment of FIRREA barred this accounting practice and, as a result, federal regulators seized and liquidated two of the three banks. *Id.* at 858, 116 S.Ct. 2432. The Supreme Court found the Government liable for breach of contract. *Id.* at 910, 116 S.Ct. 2432.

Since the decision in *Winstar*, courts have struggled with its meaning. The *Winstar* decision was a plurality opinion; seven justices agreed on the issue of Government liability but their reasoning differed, including whether the unmistakability doctrine was applicable to the contracts in

the case.[5] In this case, Plaintiffs rely on Justice Souter's reasoning in *Winstar* that the application of the unmistakability doctrine turned on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the government. *Winstar*, 518 U.S. at 879, 116 S.Ct. 2432. Specifically, Plaintiffs rely on the following in Justice Souter's plurality opinion:

> So long as such a contract is reasonably construed to include a risk- shifting component that may be enforced without effectively barring the exercise of that power, the enforcement of the risk allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it. *Id.* at 880, 116 S.Ct. 2432.

Here, Plaintiffs allege that the contract includes a risk-shifting component; that is, FmHA accepted the risk that future legislative changes requiring it to subject owners to inconsistent regulatory measures would force it to indemnify owners for losses stemming from its nonperformance. Thus, Plaintiffs allege that the unmistakability doctrine should not apply.

However, a majority of the justices in *Winstar* found that the unmistakability doctrine applied to all government contracts, regardless of the nature of the contract or remedy sought.[6] The Federal Circuit in Yankee Atomic adopted the

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[5] For an informative discussion of the various opinions in *Winstar* see *Adams v. United States*, 42 Fed.Cl. 463, 481-83 (1998).

[6] The concurrence and the dissent comprised the majority of justices who found the unmistakability doctrine applicable to all government contracts. *Winstar*, 518 U.S. 839, 116 S.Ct. 2432. The concurrence consisted of Justices Scalia, Kennedy and Thomas. *Id.* The dissent included Chief Justice Rehnquist and Justice Ginsburg. *Id.* The plurality opinion, joined by four justices, found that the unmistakability doctrine was inapplicable because they read the contracts as containing provisions essentially shifting the risk of legislation to the Government. *Id.* at 880-81, 116 S.Ct. 2432. However, the five justices comprising the concurrence and dissent

view of the five justices in *Winstar* regarding the applicability of the unmistakability doctrine. *Yankee Atomic*, 112 F.3d at 1579. There, the Federal Circuit reasoned that the unmistakability doctrine applied in the case because "this conclusion respects the view of the five justices who stated that the application of the doctrine is unrelated to the nature of the underlying contracts." *Id.* Thus, the Court follows the Federal Circuit's reasoning that the unmistakability doctrine should be applied to all government contracts.

Although the statement from the Federal Circuit in Yankee Atomic resolves this issue, it should be noted that other judges from the Court of Federal Claims reached the same result. In *Franconia Assoc.*, the court found the "controlling holding on the doctrine" as expressed by the majority of the Supreme Court to be that the unmistakability doctrine "must be used in interpreting all government contracts." *Franconia Assoc.*, 43 Fed.Cl. at 714. In *Adams*, the court also found the unmistakability doctrine applicable, stating that the doctrine "applies even if the contract can be reasonably construed as a risk-shifting agreement and the enforcement of the agreement would not effectively bar the exercise of a sovereign power." *Adams*, 42 Fed.Cl. at 482-83.

Since this case involves a government contract and Plaintiffs have alleged that an act of Congress breached the contract, the Court finds that the unmistakability doctrine should be applied. The next issue is whether the Government made an unmistakable promise not to subject Plaintiffs' prepayment option to contrary legislation.

4. Application of the Unmistakability Doctrine

Plaintiffs argue that if the unmistakability doctrine applies, this Court should find that an unmistakable promise

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believed that the plurality had misapplied precedent. *Id.* at 919, 116 S.Ct. 2432.

was made not to subject the prepayment option to future inconsistent regulations.

What constitutes an unmistakable promise? In *Winstar*, the concurrence found that the contract at issue included an unmistakable promise to regulate the savings and loans in a particular manner in the future. *Winstar*, 518 U.S. at 922, 116 S.Ct. 2432. As pointed out by the court in *Franconia*, the concurrence explained that the "contract itself" was an unmistakable promise and to say otherwise would have rendered the contract illusory. *Franconia*, 43 Fed.Cl. at 715 (citing *Winstar*, 518 U.S. at 921, 116 S.Ct. 2432 (Scalia, J., concurring)). Justice Scalia went further to state, "Indeed, it is hard to imagine what additional assurance that the course of regulation would not change could have been demanded other than, perhaps, the Government's promise to keep its promise. That is not what the doctrine of unmistakability requires." *Winstar*, 518 U.S. at 922, 116 S.Ct. 2432.

Here, Plaintiffs attempt to draw an analogy between the prepayment term in the contracts in this case to the promise to afford favorable accounting treatment to Plaintiffs' in *Winstar*. This analogy falls short. In *Winstar*, the court found the accounting treatment to be granted supervisory goodwill and capital credits the subject of the express agreements between the regulators and the acquiring financial institutions. *Id.* at 853-55, 116 S.Ct. 2432. It was the purpose of the agreements. It is logical to conclude that the financial institutions would not have contracted with the government to acquire the failing thrifts without this favorable accounting treatment. When the Federal Circuit ruled on *Winstar*, they stated "if supervisory good will had not been available for purposes of meeting regulatory capital requirements, the merged thrift would have been subject to regulatory noncompliance and penalties from the moment of its creation." *Winstar v. United States*, 64 F.3d 1531, 1542 (Fed.Cir.1995). Moreover, the terms and conditions of the agreement were reached through extensive negotiations

between regulators and the financial institutions. *Id.* at 1536. This is evidenced by the numerous documents which comprise the "Agreement" of the parties. *Id.* at 1541.

In the case at bar, borrowers lacked bargaining power over the prepayment provision contained in the promissory notes. Here, borrowers entered into contracts with the FmHA for the purpose of providing low-income housing to eligible persons in return for low-interest loans at rates unavailable in the market. Here, unlike the special accounting procedures in *Winstar*, the prepayment provision was prescribed by regulation. While the prepayment provision in the contracts is an important provision, it is not the "quid pro quo" or the purpose of the contracts as was the promise to afford favorable accounting treatment in *Winstar*. Contrary to Plaintiffs' beliefs, the prepayment provision contained in the standard form promissory note is not the essence of the agreement. Here, striking the prepayment provision from the promissory note leaves a viable contract. In contrast, striking the favorable accounting treatment from the *Winstar* contracts, the essence of the agreement is destroyed--nothing is left. Thus, under this analysis no unmistakable promise can be found.

In the case at bar, the provisions that Plaintiffs claim unmistakably promise to insulate the prepayment provision from subsequent acts of Congress read as follows: "This note shall be subject to the present regulations of the Farmers Home Administration and to its future regulations not inconsistent with the express provisions hereof." Additionally, Defendant points out that promissory notes executed by at least two Plaintiffs, Grass Valley Terrace and The Highlands, reads: "This Note shall be subject to the present regulations of the Farmers Home Administration and to its future regulations and provisions hereof." Def. Reply Brief, n. 16, at 24.

In examining the plain language of these provisions, it cannot be concluded that the Government surrendered its

sovereign power to enact subsequent legislation. In the first provision, the language at issue prevents the Farmers Home Administration from enacting future inconsistent regulations. However, we cannot expand this language to include changes in legislation. See *Parkridge Investors v. Farmers Home Admin.*, 13 F.3d 1192, 1198 (finding that future regulations are not synonymous with future acts of Congress). The unmistakability doctrine specifically precludes a reading of any unstated terms. One can not infer that "future regulations" meant to include subsequent legislation.

Moreover, the latter prepayment provision clearly indicates that Plaintiffs assumed the risk of future regulatory and legislative changes.

Recently, the Court of Federal Claims applied the unmistakability doctrine in *Franconia* and *Adams*. *Franconia*, 43 Fed.Cl. 702; *Adams*, 42 Fed.Cl. 463. In both of these cases the court found identical language not to constitute an unmistakable promise that future legislation would not affect the prepayment terms of Plaintiffs' promissory notes. In *Franconia*, the court stated:

> [T]hat it is likely that some property owners might not have entered into the agreements had the prepayment terms been less generous–it was not the reason for the agreement. By definition, a prepayment provision is not going to be the purpose of a loan.

Franconia, 43 Fed.Cl. at 715.

In *Adams*, the court stated:

> Implying a surrender of sovereign power from the contract's prepayment term cannot be termed unmistakable. Indeed, if the surrender of sovereign power were to be implied, such a promise would be no different than what applies to private parties, but more than this is required under the unmistakability doctrine.

Adams, 42 Fed.Cl. at 483.

Because the Court finds that the Government did not promise in unmistakable terms that it would not exercise its sovereign power to enact subsequent legislation to carry out the purpose of the FmHA loans, Plaintiffs' motion for partial summary judgment as to Count I of Plaintiffs' complaint is DENIED.

VI. Conclusion

Pursuant to RCFC 54(b), inasmuch as there appears to be no just reason for delay, it is hereby ORDERED that Defendant's motion to dismiss the claims of pre-1979 contract holders because the claims violate the statute of limitations is GRANTED. The Clerk is directed to dismiss all Plaintiffs holding pre-1979 contracts.[7] It is further ORDERED that Plaintiffs' motion for partial summary judgment is DENIED. The parties shall contact the Court within 2 weeks

[7] The Clerk is ORDERED to dismiss the breach of contract claims of the following Plaintiffs: (1) Majorie W. Kassner, (2) Eileen Kothe, (3) Peters, Williams & Kubota, a general partnership, (4) Pine Needles Apartments Limited Partnership, (5) Richard and Beatrice Schmidtbauer, (6) The Highlands, and (7) a portion of NRCB Limited Partnership breach of contract claim relating to its December 31, 1975 loan. The Court does not decide today whether ABCD Trust is a "pre-1979" or "post-1979" Plaintiff. The Court will hear argument on this issue later.

of the date of this opinion to schedule a status conference to discuss the remainder of the case.

United States court of Appeals for the Federal Circuit

99-5123

FRANCONIA ASSOCIATES, DAVID HODGES, SR. C/O HODGES DEVELOPMENT CORP, JOANNE M. HODGES, R.C. GETTY APARTMENTS, R.C. MO APARTMENTS, R.C. PIERRE APARTMENTS, R.C. SPRINGS APARTMENTS, SCENIC VALLEY ASSOCIATES, VALLEY ASSOCIATES, DUBLIN PLAZA, INC., EVERGREEN MANOR ASSOCIATES, FOX RIDGE PHASE II, MARILYN GRAHAM, GREENWAY OF ALTOONA ASSOCIATES, PHASE I, GREENWAY OF NEWTON ASSOCIATES, PHASE I, PHOEBE J. PERRI, PINE NEEDLES APARTMENTS, PRAIRIE VILLAGE OF ALTOONA ASSOCIATES, PRAIRIE VILLAGE OF GRIMES ASSOCIATES, PRAIRIE VILLAGE OF HUXLEY ASSOCIATES, PRAIRIE VILLAGE OF LAPORTE CITY ASSOCIATES, PRAIRIE VILLAGE OF SLATER ASSOCIATES, PRAIRIE VILLAGE OF STATE CENTER ASSOCIATES, TIMBERBROOK PROPERTIES and BRIAN E. WELLS,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

United States Court of Appeals for the Federal Circuit

ORDER

A petition for rehearing en banc having been filed by the APPELLANTS, and a response thereto having been invited by the court and filed by the APPELLEE, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 19, 2001.

FOR THE COURT,
/s/
Jan Horbaly
Clerk

Dated: June 12, 2001

cc: Jeff H. Eckland
Mark L. Josephs

FRANCONIA ASSOCIATES V US, 99-5123
(CFC - 97-CV-381)

PUBLIC LAW 100-242 [S. 825]; February 5, 1988

HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1987

TITLE II-PRESERVATION OF LOW INCOME HOUSING

Subtitle A-General Provisions

SEC. 201. SHORT TITLE.

This title may be cited as the "Emergency Low Income Housing Preservation Act of 1987".

SEC. 202. FINDINGS AND PURPOSE.

(a) FINDINGS.–The Congress finds that–

(1) in the next 15 years, more than 330,000 low income housing units insured or assisted under sections 221(d)(3) and 236 of the National Housing Act could be lost as a result of the termination of low income affordability restrictions;

(2) in the next decade, more than 465,000 low income housing units produced with assistance under section 8 of the United States Housing Act of 1937 could be lost as a result of the expiration of the rental assistance contracts;

(3) some 150,000 units of rural low income housing financed under section 515 of the Housing Act of 1949 are threatened with loss as a result of the prepayment of mortgages by owners;

(4) the loss of this privately owned and federally assisted housing, which would occur in a period of sharply rising rents on unassisted housing and extremely low production of additional low rent housing, would inflict unacceptable harm on current tenants and would precipitate a grave national crisis in the supply of low income housing that was neither

anticipated nor intended when contracts for these units were entered into;

(5) the loss of this affordable housing, to encourage the production of which the public has provided substantial benefits over past years, would irreparably damage hard-won progress toward such important and long-established national objectives as–

(A) providing a more adequate supply of decent, safe, and sanitary housing that is affordable to low income Americans;

(B) increasing the supply of housing affordable to low income Americans that is accessible to employment opportunities; and

(C) expanding housing opportunities for all Americans, particularly members of disadvantaged minorities;

(6) the provision of an adequate supply of low income housing has depended and will continue to depend upon a strong, long-term partnership between the public and private sectors that accommodates a fair return on investment;

(7) recent reductions in Federal housing assistance and tax benefits related to low income housing have increased the incentives for private industry to withdraw from the production and management of low income housing;

(8) efforts to retain this housing must take account of specific financial and market conditions that differ markedly from project to project;

(9) a major review of alternative responses to this threatened loss of affordable housing is now being undertaken by numerous private sector task forces as well as State and local organizations; and

(10) until the Congress can act on recommendations that will emerge from this review, interim measures are

needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants.

(b) PURPOSE.–It is the purpose of this title–

(1) to preserve and retain to the maximum extent practicable as housing affordable to low income families or persons those privately owned dwelling units that were produced for such purpose with Federal assistance;

(2) to minimize the involuntary displacement of tenants currently residing is such housing; and

(3) to continue the partnership between all levels of government and the private sector in the production and operation of housing that is affordable to low income Americans.

SEC. 203. TERMINATION OF CERTAIN PROVISIONS.

(a) IN GENERAL.–Effective upon the expiration of the 2-year period beginning on the date of the enactment of this Act–

(1) subtitles B and D are repealed; and

(2) each provision of law amended by subtitle B or D is amended to read as it would without such amendment.

(b) SAVINGS PROVISION.–The repeal or amendment of any provision under subsection (a) shall have no effect on any action taken or authorized under the provision prior to such repeal or amendment.

* * *

Subtitle C–Rural Rental Housing Displacement Prevention

SEC. 241. PREPAYMENT AND REFINANCING PROCEDURES.

Section 502(c) of the Housing Act of 1949 is amended by adding at the end the following new paragraphs:

"(3) NOTICE OF OFFER TO PREPAY.–Not less than 30 days after receiving an offer to prepay any loan made or insured

under section 514 or 515, the Secretary shall provide written notice of the offer or request to the tenants of the housing and related facilities involved, to interested nonprofit organizations, and to any appropriate State and local agencies.

"(4)(A) AGREEMENT BY BORROWER TO EXTEND LOW INCOME USE.-Before accepting any offer to prepay, or requesting refinancing in accordance with subsection (b)(3) of, any loan made or insured under section 514 or 515 pursuant to a contract entered into before December 21, 1979, the Secretary shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed.

"(B) ASSISTANCE AVAILABLE TO BORROWER TO EXTEND LOW INCOME USE.-To the extent of amounts provided in appropriation Acts, the agreement under subparagraph (A) may provide for 1 or more at the following forms of assistance that the Secretary, after taking into account local market conditions, determines to be necessary to extend the low income use of the housing and related facilities involved:

"(i) Increase in the rate of return on investment.

"(ii) Reduction of the interest rate on the loan through the provision of interest credits under section 521(a)(1)(B).

"(iii) Additional rental assistance, or an increase is assistance provided under existing contracts, under section 521(a)(2) or under section 8 of the United States Housing Act of 1937.

"(iv) An equity loan to the borrower under paragraphs (7) and (8) of section 515(b).

"(v) Incremental rental assistance in connection with loans under clauses (ii) and (iv) to the extent necessary to avoid increase in the rental payments of current tenants

not receiving rental assistance under section 521(a)(2) or under section 8 of the United States Housing Act of 1937.

"(C) APPROVAL OF ASSISTANCE.-The Secretary may approve assistance under subparagraph (B) only if the Secretary determines that the combination of assistance provided-

"(i) is necessary to provide a fair return on the investment of the borrower, and

"(ii) is the least costly alternative for the Federal Government that is consistent with carrying out the purposes of this subsection.

"(5)(A) OFFER TO SELL TO NONPROFIT ORGANIZATIONS AND PUBLIC AGENCIES.-

"(i) IN GENERAL.-If the Secretary determines after a reasonable period that an agreement will not be entered into with a borrower under paragraph (4), the Secretary shall require the borrower (except as provided is subparagraph (G)) to offer to sell the assisted housing and related facilities involved to any qualified nonprofit agency at a fair market value determined by 2 independent appraisers, one of whom shall be selected by the Secretary and one of whom shall be selected by the borrower. If the 2 appraisers fail to agree on the fair market value, the Secretary and the borrower shall jointly select a third appraiser, whose appraisal shall be binding on the Secretary and the borrower.

"(ii) PERIOD FOR WHICH REQUIREMENT APPLICABLE.-If, upon the expiration of 180 days after an offer is made to sell housing and related facilities under clause (i), no qualified nonprofit organization or public agency has made a bona fide offer to purchase, the Secretary may accept the offer to prepay, or may request refinancing in accordance with subsection (b)(3) of, the loan. This clause shall apply only when funds are available for purposes of carrying out a transfer under this paragraph.

"(B) Qualified nonprofit organizations and public agencies.-

"(i) LOCAL NONPROFIT ORGANIZATION OR PUBLIC AGENCY.-A local nonprofit organization or public agency may purchase housing and related facilities under this paragraph only if-

"(I) the organization or agency is determined by the Secretary to be capable of managing the housing and related facilities (either directly or through a contract) for the remaining useful life of the housing and related facilities; and

"(II) the organization or agency has entered into an agreement that obligates it (and successors in interest thereof) to maintain the housing and facilities as affordable for very low-income families or persons and low income families or persons for the remaining useful life of the housing and related facilities.

"(ii) NATIONAL OR REGIONAL NONPROFIT ORGANIZATION.-If the secretary determines that there is no local nonprofit organization or public agency qualified to purchase the housing and related facilities involved, the Secretary shall require the borrower to offer to sell the assisted housing and related facilities to an existing qualified national or regional nonprofit organization.

"(C) FINANCING OF SALE-To facilitate the sale described in subparagraph (A), the Secretary shall-

"(i) to the extent provided in appropriation Acts, make an advance to the nonprofit organization or public agency whose offer to purchase is accepted under this paragraph to cover any direct costs (other than the purchase price) incurred by the organization or agency in purchasing and assuming responsibility for the housing and related facilities involved;

"(ii) approve the assumption, by the nonprofit organization or public agency involved, of the loan made or insured under section 514 or 515;

"(iii) to the extent provided in appropriation Acts, transfer any rental assistance payments that are received under section 521(a)(2)(A), or under section 8 of the United States Housing Act of 1937, with respect to the housing and related facilities involved; and

"(iv) to the extent provided in appropriation Acts, provide a loan under section 515(c)(3) to the nonprofit organization or public agency whose offer to purchase is accepted under this paragraph to enable the organization or agency to purchase the housing and related facilities involved.

"(D) RENT LIMITATION AND ASSISTANCE.-The Secretary shall, to the extent provided in appropriation Acts, provide to each nonprofit organization or public agency purchasing housing and related facilities under this paragraph financial assistance (in the form of monthly payments or forgiveness of debt) in an amount necessary to ensure that the monthly rent payment made by each low income family or person residing in the housing does not exceed the maximum rent permitted under section 521(a)(2)(A).

"(E) RESTRICTION ON SUBSEQUENT TRANSFERS.-Except as provided is subparagraph (B)(ii), the Secretary may not approve the transfer of any housing and related facilities purchased under this paragraph during the remaining useful life of the housing and related facilities, unless the Secretary determines that-

"(i) the transfer will further the provision of housing and related facilities for low income families or persons; or

"(ii) then is no longer a need for such housing and related facilities by low income families or persons.

"(F) GENERAL RESTRICTION ON PREPAYMENTS AND REFINANCINGS.-Following the transfer of the maximum

number of dwelling units set forth in subparagraph (H)(i) in any fiscal year or the maximum number of dwelling units for which budget authority is available in any fiscal year, the Secretary may not accept in such fiscal year any offer to prepay, or request refinancing in accordance with subsection (b)(3) of, any loan made or insured under section 514 or 515 pursuant to a contract entered into before December 21, 1979, except in accordance with subparagraph (G). The limitation established in this subparagraph shall not apply to an offer to prepay, or request to refinance, if, following the date on which such offer or request is made (or following the date of the enactment of the Housing and Community Development Act of 1987, whichever occurs later) a 15-month period expires during which no budget authority is available to carry out this paragraph. For purposes of this subparagraph, the Secretary shall allocate budget authority under this paragraph in the order in which offers to prepay, or request to refinance, are made.

"(G) EXCEPTION.–This paragraph shall not apply to any offer to prepay, or any request to refinance in accordance with subsection (b)(3), any loan made or insured under section 514 or 515 pursuant to a contract entered into before December 21, 1979, if–

"(i) the borrower enters into an agreement with the Secretary that obligates the borrower (and successors in interest thereof)–

"(I) to utilize the assisted housing and related facilities for the purposes specified in action 514 or 515, as the case may be, for the a period described in paragraph (1)(B) calculated from the date on which the loan is made or insured); and

"(II) upon termination of the period described in paragraph (1)(B), to offer to sell the assisted housing and facilities to a qualified nonprofit organization or public agency in accordance with this paragraph; or

"(ii) the Secretary determines that housing opportunities of minorities will not be materially affected as a result of the prepayment or refinancing, and that–

"(I) the borrower (and any successor in interest thereof) are obligated to ensure that tenants of the housing and related facilities financed with the loan will not be displaced due to a change in the use of the housing, or to an increase in rental or other charges, as a result of the prepayment or refinancing; or

"(II) there is an adequate supply of safe, decent, and affordable rental housing within the market area of the housing and related facilities and sufficient actions have been taken to ensure that the rental housing will be made available to each tenant upon displacement.

"(H) FUNDING.–

"(i) BUDGET LIMITATION.–Not more than 5,000 dwelling units may be transferred under this paragraph in any fiscal year, and the budget authority that may be provided under this paragraph for any fiscal year may not exceed the amounts required to carry out this paragraph with respect to such number.

"(ii) REIMBURSEMENT OF RURAL HOUSING INSURANCE FUND.–There are authorized to be appropriated to the Rural Housing Insurance Fund such sums as may be necessary to reimburse the Fund for financial assistance provided under this paragraph, paragraph (4), and section 517(j)(7).

"(I) Definition.–For purposes of this paragraph, the term 'non-profit organization' means any private organization–

"(i) no part of the net earnings of which inures to the benefit of any member, founder, contributor, or individual; and

"(ii) that is approved by the Secretary as to financial responsibility.

"(J) REGULATIONS.–Notwithstanding section 534, the Secretary shall issue final regulations to carry out this paragraph not later than 60 days after the date of the enactment of the Housing and Community Development Act of 1987. The Secretary shall provide for the regulations to take effect not later than 45 days after the date on which the regulations are issued.".

SEC. 242. EQUITY RECAPTURE LOANS AND LOANS TO NONPROFIT ORGANIZATIONS AND PUBLIC AGENCIES.

Section 515 of the Housing Act of 1949 is amended–

(1) by redesignating subsections (c) through (p) as subsections (d) through (q), respectively; and

(2) by inserting after subsection (b) the following:

"(c) with respect to a loan made or insured under subsection (a) or (b), the Secretary is authorized to–

"(1) make or insure an equity loan in the form of a supplemental loan for the purpose of equity takeout to the owner of housing financed with a loan made or insured under this section pursuant to a contract entered into before December 21, 1979, for the purpose of extending the affordability of the housing for low income families or persons and very low-income families or persons for not less than 20 years, except that such loan may not exceed 90 percent of the value of the equity in the project as determined by the Secretary;

"(2) transfer and reamortize an existing loan in connection with assistance provided under paragraph (1); and

"(3) make or insure a loan to enable a nonprofit organization or public agency to make a purchase described in section 502(c)(5).".

SEC. 243. USE OF RURAL HOUSING INSURANCE FUND.

Section 517(j) of the Housing Act of 1949 is amended–

(1) by striking "and" at the end of paragraph (5);

(2) by striking the period at the end of paragraph (6) and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(7) to provide advances and assistance required to carry out paragraphs (4) and (5) of section 502(c).".

28 U.S.C. § 2501. (1994)

§ 2501. Time for filing suit

Every claim of which the United States Court of Federal claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account.

42 U.S.C. § 1472 (1994)

§ 1472. Loans for housing and buildings on adequate farms

* * *

(c) Prepayment and refinancing provisions

* * *

(4) (A) Agreement by borrower to extend low income use

Before accepting any offer to prepay, or requesting refinancing in accordance with subsection (b)(3) of this section of, any loan made or insured under section 1484 or 1485 of this title pursuant to a contract entered into prior to December 15, 1989, the Secretary shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed.

(B) Assistance available to borrower to extend low income use

To the extent of amounts provided in appropriation Acts, the agreement under subparagraph (A) may provide for 1 or more of the following forms of assistance that the Secretary, after taking into account local market conditions, determines to be necessary to extend the low income use of the housing and related facilities involved:

(i) Increase in the rate of return on investment.

(ii) Reduction of the interest rate on the loan through the provision of interest credits under section 1490a(a)(1)(B) of this title.

(iii) Additional rental assistance, or an increase in assistance provided under existing contracts, under section 1490a(a)(2) of this title or under section 1437f of this title.

(iv) An equity loan to the borrower under paragraphs (1) and (2) of section 1485(c) of this title.

(v) Incremental rental assistance in connection with loans under clauses (ii) and (iv) to the extent necessary to avoid increases in the rental payments of current tenants not receiving rental assistance under section 1490a(a)(2) of this title or under section 1437f of this title.

(vi) In the case of a project that has received rental assistance under section 1437f of this title, permitting the owner to receive rent in excess of the amount determined necessary by the Secretary to defray the cost of long-term repair or maintenance of such a project.

(C) Approval of assistance

The Secretary may approve assistance under subparagraph (B) only if the Secretary determines that the combination of assistance provided-

(i) is necessary to provide a fair return on the investment of the borrower; and

(ii) is the least costly alternative for the Federal Government that is consistent with carrying out the purposes of this subsection.

(5) (A) Offer to sell to nonprofit organizations and public agencies

(i) In general

If the Secretary determines after a reasonable period that an agreement will not be entered into with a borrower under paragraph (4), the Secretary shall require the borrower (except as provided in subparagraph (G)) to offer to sell the assisted housing and related facilities involved to any qualified nonprofit organization or public agency at

a fair market value determined by 2 independent appraisers, one of whom shall be selected by the Secretary and one of whom shall be selected by the borrower. If the 2 appraisers fail to agree on the fair market value, the Secretary and the borrower shall jointly select a third appraiser, whose appraisal shall be binding on the Secretary and the borrower.

(ii) Period for which requirement applicable

If, upon the expiration of 180 days after an offer is made to sell housing and related facilities under clause (i), no qualified nonprofit organization or public agency has made a bona fide offer to purchase, the Secretary may accept the offer to prepay, or may request refinancing in accordance with subsection (b)(3) of this section of, the loan. This clause shall apply only when funds are available for purposes of carrying out a transfer under this paragraph.

(B) Qualified nonprofit organizations and pubic agencies

(i) Local nonprofit organization or public agency

A local nonprofit organization or public agency may purchase housing and related facilities under this paragraph only if-

(I) the organization or agency is determined by the Secretary to be capable of managing the housing and related facilities (either directly or through a contract) for the remaining useful life of the housing and related facilities; and

(II) the organization or agency has entered into an agreement that obligates it (and successors in interest thereof) to maintain the housing and related facilities as affordable for very low-income families or persons and low

income families or persons for the remaining useful life of the housing and related facilities.

(ii) National or regional nonprofit organization

If the Secretary determines that there is no local nonprofit organization or public agency qualified to purchase the housing and related facilities involved, the Secretary shall require the borrower to offer to sell the assisted housing and related facilities to an existing qualified national or regional nonprofit organization.

(iii) Selection of qualified purchaser

The Secretary shall promulgate regulations that establish criteria for selecting a qualified nonprofit organization or public agency to purchase housing and related facilities when more than 1 such organization or agency has made a bona fide offer. Such regulations shall give a priority to those organizations or agencies with the greatest experience in developing or managing low income housing or community development projects and with the longest record of service to the community.

(C) Financing of sale

To facilitate the sale described in subparagraph (A), the Secretary shall–

(i) to the extent provided in appropriation Acts, make an advance to the nonprofit organization or public agency whose offer to purchase is accepted under this paragraph to cover any direct costs (other than the purchase price) incurred by the organization or agency in purchasing and assuming responsibility for the housing and related facilities involved;

(ii) approve the assumption, by the nonprofit organization or public agency involved, of the loan made or insured under section 1484 or 1485 of this title;

(iii) to the extent provided in appropriation Acts, transfer any rental assistance payments that are received under section 1490a(a)(2)(A) of this title, or under section 1437f of this title, with respect to the housing and related facilities involved; and

(iv) to the extent provided in appropriation Acts, provide a loan under section 1485(c)(3) of this title to the nonprofit organization or public agency whose offer to purchase is accepted under this paragraph to enable the organization or agency to purchase the housing and related facilities involved.

(D) Rent limitation and assistance

The Secretary shall, to the extent provided in appropriation Acts, provide to each nonprofit organization or public agency purchasing housing and related facilities under this paragraph financial assistance (in the form of monthly payments or forgiveness of debt) in an amount necessary to ensure that the monthly rent payment made by each low income family or person residing in the housing does not exceed the maximum rent permitted under section 1490a(a)(2)(A) of this title.

(E) Restriction on subsequent transfers

Except as provided in subparagraph (B)(ii), the Secretary may not approve the transfer of any housing and related facilities purchased under this paragraph during the remaining useful life of the housing and related facilities, unless the Secretary determines that–

(i) the transfer will further the provision of housing and related facilities for low income families or persons; or

(ii) there is no longer a need for such housing and related facilities by low income families or persons.

(F) General restriction on prepayments and refinancings

Following the transfer of the maximum number of dwelling units set forth in subparagraph (H)(i) in any fiscal year or the maximum number of dwelling units for which budget authority is available in any fiscal year, the Secretary may not accept in such fiscal year any offer to prepay, or request refinancing in accordance with subsection (b)(3) of this section of, any loan made or insured under section 1484 or 1485 of this title pursuant to a contract entered into prior to December 15, 1989, except in accordance with subparagraph (G). The limitation established in this subparagraph shall not apply to an offer to prepay, or request to refinance, if, following the date on which such offer or request is made (or following February 5, 1988, whichever occurs later) a 15-month period expires during which no budget authority is available to carry out this paragraph. For purposes of this subparagraph, the Secretary shall allocate budget authority under this paragraph in the order in which offers to prepay, or request to refinance, are made.

(G) Exception

This paragraph shall not apply to any offer to prepay, or any request to refinance in accordance with subsection (b)(3) of this section, any loan made or insured under section 1484 or 1485 of this title pursuant to a contract entered into prior to December 15, 1989, if–

(i) the borrower enters into an agreement with the Secretary that obligates the borrower (and successors in interest thereof)–

(I) to utilize the assisted housing and related facilities for the purposes specified in section 1484 or 1485 of this title, as the case may be, for a period determined by the Secretary (but not less than the period described in paragraph (1)(B)

calculated from the date on which the loan is made or insured); and

(II) upon termination of the period described in paragraph (1)(B), to offer to sell the assisted housing and related facilities to a qualified nonprofit organization or public agency in accordance with this paragraph; or

(ii) the Secretary determines that housing opportunities of minorities will not be materially affected as a result of the prepayment or refinancing, and that–

(I) the borrower (and any successor in interest thereof) are obligated to ensure that tenants of the housing and related facilities financed with the loan will not be displaced due to a change in the use of the housing, or to an increase in rental or other charges, as a result of the prepayment or refinancing; or

(II) there is an adequate supply of safe, decent, and affordable rental housing within the market area of the housing and related facilities and sufficient actions have been taken to ensure that the rental housing will be made available to each tenant upon displacement.

(H) Funding

(i) Budget limitation

Not more than 5,000 dwelling units may be transferred under this paragraph in any fiscal year, and the budget authority that may be provided under this paragraph for any fiscal year may not exceed the amounts required to carry out this paragraph with respect to such number.

(ii) Reimbursement of rural housing insurance fund

There are authorized to be appropriated to the Rural Housing Insurance Fund such sums as may be necessary to reimburse the Fund for financial

assistance provided under this paragraph, paragraph (4), and section 1487(j)(7) of this title.

(I) Definitions

For purposes of this paragraph:

(i) Local nonprofit organization

The term "local nonprofit organization" means a nonprofit organization that–

(I) has a broad based board reflecting various interests in the community or trade area; and

(II) is a not-for-profit charitable organization whose principal purposes include developing or managing low income housing or community development projects.

(ii) Nonprofit organization

The term "nonprofit organization" means any private organization–

(I) no part of the net earnings of which inures to the benefit of any member, founder, contributor, or individual;

(II) that is approved by the Secretary as to financial responsibility; and

(III) that does not have among its officers or directorate persons or parties with a material interest (or persons or parties related to any person or party with such an interest) in loans financed under section 1485 of this title that have been prepaid.

(J) Regulations

Notwithstanding section 1490n of this title, the Secretary shall issue final regulations to carry out this paragraph not later than 60 days after February 5, 1988. The Secretary shall provide for the regulations to take effect not later than 45 days after the date on which the regulations are issued.

* * *

Subpart E-Prepayment and Displacement Prevention of Multi-Family Housing loans

SOURCE: 58 FR 38931, July 21, 1993, unless otherwise noted.

* * *

§ 1965.215 Borrower rejection of incentive offer–approving/ disapproving prepayment.

(a) *Approving or disapproving prepayments.* If the borrower rejects the incentive offer and indicates a preference to prepay, prepayment may be approved in accordance with paragraph (d) of this section within 160 days of the decision that the prepayment can be accepted if the determinations required in paragraph (c) of this section can be made. Exhibit E of this subpart provides additional guidance for making the necessary determinations. The State Director or other designated official in the National Office, with the recommendation of the Servicing Official, will make the decision to either approve or disapprove the prepayment request.

(b) *Determining the need for housing.* (1) The Servicing Office or other designated office will review the following, using exhibit E of this subpart as a guide:

(i) Local market conditions;

(ii) Information submitted as support for the prepayment request;

(iii) Responses to the 30-day tenant comment period;

(iv) the effect of the prepayment on minorities, handicapped individuals, and families with children; and

(v) Any other relevant information.

(2) The results of the determination of need will be documented in the case file.

(c) *Conditions under which prepayment may be approved.* In certain instances, prepayment may be approved after a borrower has rejected the incentive offer. If the decision is made to approve a prepayment request, restrictive-use provisions will be inserted in the deed, deed of release or satisfaction, if the project is determined to be needed under the provisions of the following paragraphs (1)(i) and (ii) of this section. The borrower will also execute the applicable restrictive-use agreement. If the project has section 8 assistance, the local HUD Area Office must be notified. To determine whether a prepayment offer can be approved, the following decision steps must be followed by the Servicing Office:

(1) *The loan is not currently subject to restrictive-use provisions nor prohibition on prepayment.* To determine whether a loan not subject to restrictive-use provisions or prohibition on prepayment may prepay, and if so, what restrictions must be inserted in the release documents, the following determinations must be made.

(i) If the Servicing Office cannot make the determination that housing opportunities to minorities will not be materially affected as a result of the prepayment, the borrower may prepay if the borrower agrees to the following restrictions and inclusion of the applicable restrictive language found in paragraph (A) or (B) of exhibit A-4 of this subpart, and to execute the applicable Restrictive-Use Agreement found in exhibit G-2 or G-3 of this subpart:

(A) Maintain the housing for low- and moderate-income people for a minimum period of 20 years from the date of the closing of the last loan or servicing action. At the end of the restrictive-use period, offer to sell the housing to a qualified nonprofit organization or public agency in accordance with paragraph (e)(9) of this section and paragraph (A) of exhibit A-4 of this subpart; or

(B) If 20 years from the date of the closing of the last loan or servicing action has already lapsed, offer to sell the

housing to a qualified nonprofit organization or public agency in accordance with paragraph (e)(9) of this section and paragraph (B) of exhibit A-4 of this subpart;

(ii) If the Servicing Office determines that housing opportunities to minorities will not be materially affected as a result of prepayment, but that there is an inadequate supply of safe, decent, and affordable rental housing within the market area, the borrower may prepay if the borrower agrees to the following restrictions and inclusion of the applicable restrictive-use language found in paragraph (C) of exhibit A-4 of this subpart and agrees to execute the Restrictive-Use Agreement found at exhibit G-4 of this subpart:

Maintain the housing for current eligible tenants in occupancy as of the date of the prepayment for the life of the project or until the current tenants are no longer eligible for the housing under FmHA or its successor agency under Public Law 103-354 regulations, or the tenants choose to vacate of their own will. The owner will ensure the tenants will not be displaced due to a change in the use of the housing, an increase in the rental or other charges as a result of the prepayment, or a decrease in income. Existing tenants are protected to ensure that none experience new or increased rent overburden until each voluntarily moves from the project.

(iii) If the Servicing Office determines that housing opportunities to minorities will not be materially affected as a result of prepayment, and that there is an adequate supply of safe, decent, and affordable rental housing within the market area for the foreseeable future, the borrower may prepay without restrictions. The provisions of paragraph (c)(3) of this section will apply.

(2) *The loan is subject to restrictive-use provisions and the borrower agrees to continue to adhere to the provisions after prepayment.* In accordance with exhibit A-3 of this subpart, the borrower agrees to continue to maintain the housing in accordance with the restrictions already in effect. The

borrower must also agree to execute the Restrictive-Use Agreement found at exhibit G-1 to this subpart.

(3) *It is determined by FmHA or its successor agency under Public Law 103-354 that restrictions are not needed.* If actions in accordance with § 1965.206 (b)(2) of this subpart and paragraph (e)(3) of this section have been taken to ensure that alternative rental housing will be made available to each tenant upon displacement, the prepayment may be accepted without restrictions if:

(i) For loans not subject to restrictive-use provisions nor prohibition on prepayment, it is determined by FmHA or its successor agency under Public Law 103-354 that housing opportunities for minorities will not be materially affected as a result of the prepayment. Exhibit E of this subpart will be used to assist in making this determination.

(ii) For loans subject to restrictive-use provisions, it is determined Federal or other financial assistance provided to residents will no longer be provided, due to no fault, action or lack of action on the part of the borrower. If a borrower applies to have restrictions removed after prepayment because Federal or other financial assistance will no longer be provided, the restrictions will be released only if the loss of Federal or other financial assistance could not have been reasonably anticipated at the time of acceptance of the prepayment.

(iii) Regardless of whether or not the loan is subject to restrictive-use provisions, a determination is made by FmHA or its successor agency under Public Law 103-354 that there is no longer a need for the housing (in accordance with exhibit E of this subpart).

(4) *Projects with both LH loans and grants.* If a prepayment is accepted on an LH loan for a project which also has an LH grant, restrictive-use provisions for the project may be released only under the conditions specified in the Grant Agreement.

(5) *Documentation.* Thorough documentation of the reasons and decision to approve prepayment will be entered in the casefile and appended to the prepayment report. Any additional materials used to reach the decision will be included in the casefile.

(d) *Borrower notification of approval or disapproval of prepayment.* The Servicing Office or other designated office will notify the borrower as to whether the prepayment has been approved or disapproved within:

(1) 15 days of the borrower's rejection of an incentive offer for loans not subject to restrictive-use provisions nor prohibited from prepayment; or

(2) 60 days of a complete prepayment request by a borrower subject to restrictive-use provisions.

(e) *Processing acceptance of prepayment.* After approval of a prepayment, the following actions must be taken:

(1) *Completion of the prepayment report and notification of the National Office.* If prepayment is approved, the Servicing Office or other designated office will complete a prepayment report in the format of exhibit B of this subpart, and submit the report with all documentation on each prepaid loan to the State Director or other designated official for indefinite retention. Any information for the report supplied by the borrower must include documentation and verification by the Servicing Office. For prepayment of on-farm labor housing units, only items relevant to the on-farm units need be completed. The State Office will notify the National Office in the format of FmHA or its successor agency under Public Law 103-354 Guide Letter 1965-E-1 (available in any FmHA or its successor agency under Public Law 103-354 office) indicating that the prepayment has been accepted. A copy of the prepayment report will be included in the materials forwarded to the National Office.

(2) *Notify interested agencies.* All interested agencies notified in accordance with § 1965.206 (b)(4) of this subpart will be notified of the decision to accept the prepayment.

Agencies which may aid displaced tenants will be advised of any anticipated displacement, the level at which post-prepayment rents will be set and any restrictive-use provisions which will remain in the deeds of release. Other agencies will be advised that no offer to sell will be made.

(3) *Notify tenants.* The Servicing Office will send an additional notice to tenants at least 60 days prior to the prepayment. The prepayment may not take place less than 60 days from the tenant notification or 180 days from the initial notification unless an exception is allowed in accordance with paragraph (f)(2) of this section. Tenant notices will be sent certified mail to each tenant and also posted at the project in public areas. Copies of the notice will remain posted at the project until the prepayment is accepted and all existing tenants voluntarily vacate their units. The notice and attachments will contain all of the following information appropriate for the prepayment action and any other relevant information necessary to allow tenants to make informed choices (FmHA or its successor agency under Public Law 103-354 Guide Letter 1965-E-3 (available in any FmHA or its successor agency under Public Law 103-354 office) and attachments are provided as a guide for this purpose). The notice will contain the following applicable statements and information:

(i) All relevant information concerning the prepayment has been reviewed and FmHA or its successor agency under Public Law 103-354 has decided to accept the prepayment on (date).

(ii) Fully detailed reason(s) describing why the prepayment was approved. Also include the reasons for acceptance of the prepayment in less than 180 days (if applicable).

(iii) At the time of prepayment, rents are expected to be $___.

(iv) The tenant will be affected by this change on (date the tenant's current lease expires, date of the prepayment or other mandated date, whichever is later.)

(v) (The following statement should be included if the loan is being prepaid but will retain restrictive-use provisions.) All current eligible tenants may continue to occupy the housing until the tenants decide to voluntarily move, the tenants no longer meet eligibility requirements or the restrictive-use provisions expire on (insert expiration date), whichever is sooner. The rents of current eligible tenants may not be increased as a result of current owner actions to exceed levels which create new or increased rent overburden as established by FmHA or its successor agency under Public Law 103-354 regulations, in accordance with title V of the Housing Act of 1949, during the period of eligible tenant occupancy during the restricted period. However, declines in tenant income shall not require corresponding reductions in rent levels. A tenant, or those wishing to occupy the housing (if applicable), as well as the Government, may seek enforcement of the provisions. Annual income recertifications will continue to be required in order to protect eligible tenant rents. The preceding requirements are binding on the current owner and any successors in interest.

(vi) (The following statement should be included if the project has project-based section 8 rents.) Eligible tenant rents will continue to be subsidized by the Department of Housing and Urban Development (HUD) until (insert the date the section 8 contract expires). (If applicable, include the following.) If section 8 subsidies are not continued after (insert the date the section 8 contract expires), the owner of the project will continue eligible tenant rents at levels that will not create or increase rent overburden until (insert date the restrictive-use expires. However, declines in tenant income shall not require corresponding reductions in rent levels.

(vii) (The following statement should be included if project-based HUD section 8 or other subsidies will expire prior to 2 years after the prepayment.) Eligible tenants currently residing in the project who may subsequently be displaced or experience rent overburden due to the prepayment may qualify for certain protections. The following protections are available to eligible tenants who believe they have experienced displacement or rent overburden:

(A) Letters of Priority Entitlement (LOPE) to other FmHA or its successor agency under Public Law 103-354 housing. Tenants may apply for LOPES up until the day the tenants' rents are scheduled to be increased. These letters will be valid for 60 days after issuance. All LOPES will be issued in accordance with title VI of the Civil Rights Act of 1964, as codified in subpart E of part 1901 of this chapter.

(B) Tenants currently receiving rental assistance (RA) will be able to continue to receive RA if they move to other FmHA or its successor agency under Public Law 103-354 financed housing in which they are eligible for RA.

(C) Tenants choosing to stay in their units after prepayment and pay higher rents, with or without Federal, State or other subsidy, are entitled to do so, unless evicted for a cause unrelated to prepayment.

(viii) Eligible tenants residing in prepaying projects will also be sent:

(A) A list of project names, locations, number of apartments, senior citizen or family designation, and unit sizes of other FmHA or its successor agency under Public Law 103-354 projects in the market area.

(B) The names and locations of other subsidized housing; and

(C) Addresses and telephone numbers of the applicable HUD area office, and other agencies which administer housing subsidies or aid in relocation anywhere in the market area.

(ix) Tenants will be allowed to review the information used to make any of the determinations regarding acceptance of the prepayment, prepayment rent increases and alternatives to prepayment.

(4) *Issue LOPEs.* Upon request by a tenant for an LOPE, the Servicing Official will prepare the letter and forward the letter to the tenant (FmHA or its successor agency under Public Law 103-354 Guide Letter 1965-E-4 (available in any FmHA or its successor agency under Public Law 103-354 office) may be used as a guide). The LOPE, which is to be addressed to FmHA or its successor agency under Public Law 103-354 borrowers, will include:

(i) A tenant with an LOPE has 60 days to apply in writing to other FmHA or its successor agency under Public Law 103-354 projects in any location in the country.

(ii) A tenant with an LOPE is to be placed at the top of all waiting lists in FmHA or its successor agency under Public Law 103-354 projects applied to, which have appropriate units the tenant qualifies for. Such tenants will follow only those tenants with LOPES who were previously placed on the waiting list. Handicapped tenants on the list for handicapped units which have appropriate design features will maintain priority over non-handicapped tenants with LOPEs.

(iii) The tenant will not be removed from the priority position on the waiting list until the tenant moves to a unit utilizing an LOPE or is purged from the waiting list in accordance with exhibit B or subpart C of part 1930 of this chapter.

(iv) If the tenant holding the LOPE is receiving RA in the prepaying project, and uses the LOPE to move to a Plan II project for which the tenant would qualify for RA, the RA will be transferred to the project to which the tenant moves. The RA will be reassigned to that tenant without competition. RA brought to a project by a tenant from a prepaying project will remain at the receiving project if the

tenant subsequently moves to another FmHA or its successor agency under Public Law 103-354 project.

(v) If the tenant's current security deposit of (a specified amount) has not been released by the prepaying project by the date a tenant moves, the new landlord will be encouraged to defer collection of the new security deposit until the tenant's current deposit is refunded, even if the date of release is after the date the tenant occupies the new unit.

(5) *Approval of tenant leases.* Prior to accepting the prepayment, the Servicing Office will also review and approve a modified tenant lease to be used for all protected tenants during any applicable restrictive-use period. This lease will explain the restrictive-use provisions, who is protected, describe the limits on rents during the period of restrictions, explain that no tenant can have a lease renewal denied for other than "good cause" (which cannot include income level), that charges, rules and regulations, and services may not change substantially from those applicable at present, and explain all other provisions necessary to protect affected tenants including Fair Housing Act Amendment provisions. The lease shall retain provisions for annual income certification. The approved lease, with signatures of both the borrower and FmHA or its successor agency under Public Law 103-354, will be maintained by the Servicing Office until expiration of the restrictive-use period, although FmHA or its successor agency under Public Law 103-354 will not be responsible for monitoring compliance. If the owner wishes to make subsequent modifications to the lease, FmHA or its successor agency under Public Law 103-354 will review the lease to ensure that none of the modifications are contrary to the intent of this regulation.

(6) *Borrower responsibilities after prepayment.* Prior to accepting the prepayment, the Servicing Official will meet with the borrower to discuss borrower obligations under restrictive-use and fair housing provisions remaining in effect after the prepayment is accepted. The Servicing

Official will review the applicable restrictive-use requirements, if any, in detail with the borrower. In particular, the Servicing Official will explain that the applicable provisions of subpart C of part 1930 of this chapter specific to tenant rights and relations shall remain in effect during the restrictive-use period. Owners of prepaid projects will be responsible for ensuring that rental procedures, verification and certification of income and/or employment, lease agreements, rent or occupancy charges, and termination and eviction remain consistent with the provisions set forth in subpart C of part 1930 of this chapter, and also adhere to applicable local, State, and Federal laws. The borrower will be informed that it is the borrower's responsibility to obtain FmHA or its successor agency under Public Law 103-354 concurrence with any changes to the preceding rental procedures that may deviate from those approved at the time of the prepayment prior to implementing the changes. Any changes proposed must be consistent with the objectives of the program and the regulations. Documentation, including annual income recertifications, shall be maintained to evidence compliance in the event there is a future complaint or audit. The former borrower must be able to document that acceptable waiting lists were maintained, units were rented to appropriate tenants, and rents were established at appropriate levels in accordance with the applicable restrictive-use provisions. The former borrower must also agree to make the documentation available for Government inspection upon request. The former borrower and any successors in interest will be required to provide the following signed and dated certification to the applicable Servicing Office or other designated office within 30 days of the beginning of each calendar year for the full period of the restrictive-use provisions:

(Name of owner) certifies that (name of project) is being operated in compliance with the restrictive-use provisions contained in (applicable release document) and the Restrictive-Use Agreement which set forth certain requirements for operation of the project for the benefit of low- and moderate-income people in conformance with applicable FmHA or its successor agency under Public Law 103-354 regulations (Name of borrower) understands that failure to operate the project in conformance with the restrictive-use provisions may cause a tenant or the Government to seek enforcement of the provisions.

The borrower must also agree to execute the applicable Restrictive-Use Agreement found at exhibits G-1 thru 4 to this Subpart.

(7) *Servicing Office responsibilities after prepayment.* Upon prepayment, the Servicing Office will send a notice to all tenants informing the tenants of the acceptance of the prepayment. The borrower will be notified that a copy of the notice must be posted and maintained in public areas in the project until all restrictive-use provisions expire. FmHA or its successor agency under Public Law 103-354 Guide Letter 1965-E-5 (available in any FmHA or its successor agency under Public Law 103-354 office) will be used for the notice. The Servicing Office or other designated office will monitor receipt of the certification referred to in paragraph (e)(6) of this section and maintain case files on the prepaid project until such time as the restrictive-use provisions expire. The Servicing office or other designated office will take such actions as necessary to follow-up on receipt of the annual certifications from each prepaid borrower. If the Servicing Office is unable to obtain borrower cooperation, the Servicing Office shall refer the case to the State Office for transmittal to the National Office for further servicing guidance and/or enforcement actions.

(8) *Payment in full and release of security.* Prior to releasing security instruments, FmHA or its successor agency under Public Law 103-354 must be certain that full payment has been received. Security Instruments will be released in accordance with § 1965.90 (b) of subpart B of part 1965 of this chapter.

(9) *Sale to nonprofit organization or public agency at end of restrictive-use period.* Borrowers who are subject to the restrictive-use provisions contained in paragraph (A) or (B) of exhibit A-4 of this subpart are required to attempt to sell the project to a nonprofit organization or public agency at the end of the restrictive-use period. Advertising the project for sale will be carried out in the same manner and time period as required for sale to nonprofits or public agencies within the program as stated in § 1965.216 (b), (c), and (d) of this subpart. Advertising will be conducted for a minimum of 180 days beginning at least 6 months prior to the expiration of the restrictive-use period. If 6 months do not remain between the date of prepayment and the end of the restrictive-use period the project will be advertised for sale for a minimum of 180 days.

(f) *Denial, postponement, waiver, or withdrawal of prepayment request*–(1) *Denial of prepayment request.* Borrowers for whom there is no prohibition on prepayment will be denied a request to prepay if the conditions required for prepayment stated in paragraph (c) of this section and exhibit E of this subpart cannot be met, or if information submitted with the prepayment request to prepay, the Servicing Official will send a letter to the borrower stating the reasons for the denial and the right to appeal the rejection, in accordance with subpart B of part 1900 of this chapter and §§ 1965.213 and 1965.215 and exhibits D and E of this subpart. The letter denying the prepayment request may revise the original incentive offer if new information documenting the loss the borrower may suffer if not allowed to prepay has been brought to the attention of the Servicing

Office. If a letter is sent offering a revised incentive, rights to appeal the denial will not be included.

(2) *Postponement of prepayment requests.* Prepayment requests will be denied if the request was received less than 180 days in advance of the project prepayment date unless the Servicing Office determines that there is sufficient time to consider tenant comments, verify information submitted with the prepayment report, and verify that all tenant leases are extended for a 180-day period from the date of the prepayment request and include current rents and conditions. Prepayment will be postponed if necessary to allow sufficient time for the second tenant notification to be sent at least 60 days prior to the prepayment, unless all tenant leases are extended to the end of the 60 days, and at least 30 days has passed since the first notification letters were sent. The extension of tenant leases does not substitute for the insertion of restrictive-use provisions in the release documents or for allowing sufficient time for tenant comments.

(3) *Withdrawal or cancellation of prepayment requests.* Prepayment authorization will be cancelled if the prepayment is not received within 180 days of the final approval of the prepayment.

(g) *Borrower appeals of prepayment disapproval.* The borrower may appeal the decision to deny prepayment without restrictive-use provisions within 30 days of the receipt of the rejection, in accordance with subpart B of part 1900 of this chapter. The incentive offer may be appealed at the same time if the borrower chooses. Tenants will be notified if a borrower appeal is pending, given the right to send written testimony to the appeal officer, and have one representative at the appeal hearing. If the decision to deny prepayment is upheld or the incentive offer is modified, the borrower will be given an additional 30 days to respond to the incentive offer. Based upon the borrower response and whether the loan is subject to restrictive-use provisions, the

Servicing Office will act in accordance with appropriate sections of this subpart. Borrowers subject to restrictive-use provisions will not be granted appeal rights.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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(1) DUBLIN PLAZA, INC., A CORPORATION
P.O. Box 1032
Pulaski, Virginia 24301

(2) EASTWOOD APARTMENTS, A LIMITED PARTNERSHIP
2401 Southbend Road
Edmond, Oklahoma 73034

(3) EVERGREEN MANOR ASSOCIATES, A LIMITED PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(4) FOX RIDGE PHASE II, A LIMITED PARTNERSHIP
P.O. Box 1032
Pulaski, Virginia 24301

(5) FRANCONIA ASSOCIATES, A LIMITED PARTNERSHIP
P.O. Box 226
Taylors Falls, Minnesota 55084

(6) MARILYN GRAHAM
5396 Bear Drive
Evergreen, Colorado 80439

(7) GREENWAY OF ALTOONA ASSOCIATES, PHASE I, A LIMITED PARTNERSHIP

FIRST AMENDED COMPLAINT FOR BREACH OF CONTRACT AND JUST COMPENSATION

File No. 97-381C
(Judge Reginald W. Gibson)

c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(8) GREENWAY OF ALTOONA ASSOCIATES, PHASE II, A LIMITED PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(9) GREENWAY OF NEWTON ASSOCIATES, PHASE I, A LIMITED PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(10) DAVID A. HODGES, SR.
c/o Hodges Development Corp.
201 Loudon Road
Concord, New Hampshire
03301

(11) DAVID A. HODGES, SR. AND JOANNE M. HODGES
c/o Hodges Development Corp.
201 Loudon Road
Concord, New Hampshire
03301

(12) PHOEBE J. PERRI
23 Hickory Hollow Drive
Madison, Wisconsin 53705

(13) PINE NEEDLES
APARTMENTS, A LIMITED
PARTNERSHIP
932 Hendersonville Road
Asheville, North Carolina
28803

(14) PRAIRIE VILLAGE OF
ADEL ASSOCIATES, A
LIMITED PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(15) PRAIRIE VILLAGE OF
ALTOONA ASSOCIATES, A
LIMITED PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(16) PRAIRIE VILLAGE OF
GRIMES ASSOCIATES, A
LIMITED PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(17) PRAIRIE VILLAGE OF
HUXLEY ASSOCIATES,
A LIMITED PARTNERSHIP
c/o Heartland Management Co.
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Des Moines, Iowa 50312

(18) PRAIRIE VILLAGE OF
LAPORTE CITY
ASSOCIATES, A LIMITED
PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(19) PRAIRIE VILLAGE OF
PARKERSBURG
ASSOCIATES, A LIMITED
PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(20) PRAIRIE VILLAGE OF
SLATER ASSOCIATES, A
LIMITED PARTNERSHIP
c/o Heartland Management Co.
529 - 36th Street
Des Moines, Iowa 50312

(21) PRAIRIE VILLAGE OF
STATE CENTER
ASSOCIATES, A LIMITED
PARTNERSHIP
c/o Heartland Management Co.
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Des Moines, Iowa 50312

(22) R.C. GETTY APARTMENTS,
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Sioux Falls, South Dakota
57101

(23) R.C. MO APARTMENTS, A GENERAL PARTNERSHIP
P.O. Box 2238
Sioux Falls, South Dakota 57101

(24) R.C. PIERRE APARTMENTS, A GENERAL PARTNERSHIP
P.O. Box 2238
Sioux Falls, South Dakota 57101

(25) R.C. SPRINGS APARTMENTS, A GENERAL PARTNERSHIP
P.O. Box 2238
Sioux Falls, South Dakota 57101

(26) SCENIC VALLEY, ASSOCIATES, A LIMITED PARTNERSHIP
P.O. Box 226
Taylors Falls, Minnesota 55084

(27) TIMBERBROOK PROPERTIES, A GENERAL PARTNERSHIP
10407 Reclinata Lane
Tampa, Florida 33618

(28) TUCKER PROPERTIES, A LIMITED PARTNERSHIP
P.O. Box 100
Carbondale, Kansas 66414

(29) TUCKER PROPERTIES II, A LIMITED PARTNERSHIP
P.O. Box 100
Carbondale, Kansas 66414

(30) VALLEY ASSOCIATES, A LIMITED PARTNERSHIP
P.O. Box 226
Taylors Falls, Minnesota 55084

(31) BRIAN E. WELLS
3210 Heatherdell Lane
Madison, Wisconsin 53713

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

For their Complaint against the defendant United States of America, plaintiffs state and allege as follows:

PRELIMINARY ALLEGATIONS

1. Each of the plaintiffs contracted with the United States of America ("the Government") for a loan to provide rental housing for low- and moderate-income persons ("the housing programs"). The Government entered into these contracts ("the contracts") with plaintiffs by and through its agency, the Farmers Home Administration, United States Department of Agriculture ("FmHA").

2. While the precise terms of these contracts vary, all of them permitted each contracting plaintiff to terminate its participation in the Government's housing programs "at the option" of plaintiff upon prepayment of each housing project's federally made or insured mortgage. Pursuant to the contracts, said optional termination rights could be exercised by plaintiffs "at any time" prior to the termination of the forty (40) or fifty (50) year terms of their contracts.

3. Congress in 1992 enacted legislation that purports to permanently repudiate the Government's contractual obligation to permit FmHA contract holders to terminate their contracts at any time at their option. As is alleged more fully below, plaintiffs contend in this action that the enactment of the 1992 legislation anticipatorily repudiates the contract between defendant and each of the plaintiffs. As is their right, plaintiffs have elected to treat the Government's anticipatory repudiation as a breach of contract as of the date of Government performance required by each contract, i.e., the date that each plaintiff would achieve its option of terminating its contract but for the Government's repudiation. Plaintiffs also allege that said legislation results in a taking of each plaintiff's property without just compensation.

4. Plaintiffs seek to recover in this auction the damages they have suffered and continue to suffer as a result of the breaches by the Government of plaintiffs' contracts and for just compensation for the taking of their properties.

(Pre-1979 FmHA Contracts)

5. Plaintiffs that entered into FmHA contracts before December 21, 1979 ("the pre-1979 FmHA contracts"), are contractually entitled to terminate their participation in the Government's housing program by exercising their option to prepay at any time. Such a prepayment would enable such plaintiffs to "go to market" and use or dispose of their property by either (i) raising the property's rents to

commercial rates; or (ii) selling the property for its commercial fair market value.

6. The 1992 legislation described below made permanent certain emergency interim measures repudiating the contractual right of pre-1979 FmHA contract holders to terminate their contracts at any time at their option.

(Post-1979 FmHA Contracts)

7. Plaintiffs that entered into FmHA contracts on or after December 21, 1979 ("the post-1979 FmHA contracts"), also are contractually entitled to exercise their option to prepay at any time. However, by their terms all post-1979 FmHA contracts are subject to a fifteen (15) or twenty (20) year restrictive use clause. This clause is binding upon the owners and their successors in interest and requires that the property be operated as low-rent housing for a period of fifteen (15) or twenty (20) years from the date of loan origination.

8. Accordingly, if a holder of a post-1979 FmHA contract intends to terminate its contract and raise its property's rents to commercial rates it must wait until on or after the end of the fifteen (15) or twenty (20) year period from the origination date of its mortgage loan to do so. Alternatively, if the holder of such a contract intends to terminate its contract and sell its property to a third party who will retain low rents for the remainder of the fifteen (15) or twenty (20) year period commencing upon loan origination, such a contract holder is contractually entitled to exercise its termination right and go to market at any time.

9. The 1992 legislation described below extended to post-1979 FmHA contract holders the interim measures that had repudiated the contractual termination right of pre-1979 FmHA contract holders, and made such measures permanent.

THE PARTIES
(Parties Plaintiff)

10. Each of the plaintiffs is a general or limited partnership, a corporation, an individual, or other legal entity which entered into a contract with FmHA for a loan to provide rental housing for low- and moderate-income residents meeting Government eligibility standards.

Rule 20(a) List

11. Pursuant to Rule 20(a) of the Rules of the Court of Federal Claims, the following comprises an alphabetized, numbered list of all said plaintiffs. The plaintiffs entered into contracts categorized by the Government as either a pre-1979 or a post-1979 contract:

1. Dublin Plaza, Inc., a corporation with an address at P.O. Box 1032, Pulaski, Virginia 24301, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Plaza Apartments, consisting of thirty-six (36) units.

2. Eastwood Apartments Limited Partnership, with an address at 2401 Southbend Road, Edmond, Oklahoma 73034, entered into one contract for three post-1979 loans for rental housing at the following project known as:

(i) Eastwood Apartments, consisting of forty-eight (48) units.

3. Evergreen Manor Associates, a Limited partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into two contracts for two pre-1979 loans for rental housing at the following projects known as:

(i) Evergreen Manor of Waukee, Phase I, consisting of sixteen (16) units; and

(ii) Evergreen Manor of Waukee, Phase II, consisting of sixteen (16) units.

4. Fox Ridge Phase II, a Limited Partnership, with an address at P.O. Box 1032, Pulaski, Virginia 24301, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Fox Ridge Apartments, consisting of sixty (60) units.

5. Franconia Associates, a Limited Partnership, with an address at P.O. Box 226, Taylors Falls, Minnesota 55084, entered into two contracts for two pre-1979 loans for rental housing at the following projects known as:

(i) Riverfront Apartments, consisting of twenty (20) units; and

(ii) Sunrise River Apartments, consisting of sixteen (16) units.

6. Marilyn Graham, with an address at 5396 Bear Drive, Evergreen, Colorado 80439, entered into three contracts for three pre-1979 loans for rental housing at the following projects known as:

(i) Rancho Verde Apartments, consisting of twenty-four (24) units;

(ii) Casa Grande I Apartments, consisting of thirty-two (32) units; and

(iii) Casa Grande II Apartments, consisting of thirty-two (32) units.

7. Greenway of Altoona Associates, Phase I, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Greenway of Altoona, Phase I, consisting of twenty-eight (28) units.

8. Greenway of Altoona Associates, Phase II, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa

50312, entered into one contract for one post-1979 loan for rental housing at the following project known as:

(i) Greenway of Altoona, Phase II, consisting of twenty (20) units.

9. Greenway of Newton Associates, Phase I, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Greenway of Newton I, consisting of twenty-eight (28) units.

10. David A. Hodges, Sr., with an address at c/o Hodges Development Corp., 201 Loudon Road, Concord, New Hampshire 03301, entered into two contracts for two pre-1979 loans for rental housing at the following projects known as:

(i) Deer Run Apartments, consisting of twenty-five (25) units; and

(ii) Beechwood Apartments, consisting of fifty (50) units.

11. David A. Hodges, Sr. and Joanne M. Hodges, with an address at c/o Hodges Development Corp., 201 Loudon Road, Concord, New Hampshire 03301, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Pinetree Apartments, consisting of fifty (50) units.

12. Phoebe J. Perri, with an address at 23 Hickory Hollow Drive, Madison, Wisconsin 53705, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Palmyra Park Apartments I, consisting of twenty-four (24) units; and one contract for one post-1979 loan for rental housing at the following project known as:

(ii) Palmyra Park Apartments II, consisting of sixteen (16) units.

13. Pine Needles Apartments, a Limited Partnership, with an address at 932 Hendersonville Road, Asheville, North Carolina 28803, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Pine Needles Apartments, consisting of forty-six (46) units.

14. Prairie Village of Adel Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into one contract for one post-1979 loan for rental housing at the following project known as:

(i) Prairie Village of Adel, consisting of twenty-four (24) units.

15. Prairie Village of Altoona Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into two contracts for two pre-1979 loans for rental housing at the following projects known as:

(i) Prairie Village of Altoona, Phase I, consisting of twenty-four (24) units; and

(ii) Prairie Village of Altoona, Phase II, consisting of twelve (12) units.

16. Prairie Village of Grimes Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into two contracts for two pre-1979 loans for rental housing at the following projects known as:

(i) Prairie Village of Grimes, Phase I, consisting of twenty-four (24) units; and

(ii) Prairie Village of Grimes, Phase II, consisting of sixteen (16) units.

17. Prairie Village of Huxley Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered

into two contracts for two pre-1979 loans for rental housing at the following projects known as:

(i) Prairie Village of Huxley, Phase I, consisting of twenty-four (24) units; and

(ii) Prairie Village of Huxley, Phase II, consisting of eight (8) units.

18. Prairie Village of LaPorte City Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Prairie Village of LaPorte City, Phase I, consisting of twenty-four (24) units; and one contract for one post-1979 loan for rental housing at the following project known as:

(ii) Prairie Village of LaPorte City, Phase II, consisting of eight (8) units.

19. Prairie Village of Parkersburg Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into one contract for one post-1979 loan for rental housing at the following project known as:

(i) Prairie Village of Parkersburg, consisting of thirty-two (32) units.

20. Prairie Village of Slater Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa 50312, entered into two contracts for two pre-1979 loans for rental housing at the following projects known as:

(i) Prairie Village of Slater, Phase I, consisting of twenty (20) units; and

(ii) Prairie Village of Slater, Phase II, consisting of eight (8) units.

21. Prairie Village of State Center Associates, a Limited Partnership, with an address at c/o Heartland Management Company, 529 - 36th Street, Des Moines, Iowa

50312, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Prairie Village of State Center, consisting of twenty-four (24) units.

22. R. C. Getty Apartments, a General Partnership, with an address at P.O. Box 2238, Sioux Falls, South Dakota 57101, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) R. C. Getty Apartments, consisting of sixteen (16) units.

23. R.C. Mo Apartments, a General Partnership, with an address at P.O. Box 2238, Sioux Falls, South Dakota 57101, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) R. C. Mo Apartments, consisting of thirty-two (32) units.

24. R. C. Pierre Apartments, a General Partnership, with an address at P.O. Box 2238, Sioux Falls, South Dakota 57101, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) R. C. Pierre Apartments, consisting of forty (40) units.

25. R. C. Springs Apartments, a General Partnership, with an address at P.O. Box 2238, Sioux Falls, South Dakota 57101, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) R. C. Springs Apartments, consisting of forty (40) units.

26. Scenic Valley Associates, a Limited Partnership, with an address at P.O. Box 226, Taylors Falls, Minnesota 55084, entered into one pre-1979 contract for one pre-1979 loan for rental housing at the following project known as:

(i) Scenic Valley Apartments, consisting of twenty-four (24) units.

27. Timberbrook Properties, a General Partnership, with an address at 10407 Reclinata Lane, Tampa, Florida 33618, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Timberbrook Apartments, consisting of twenty (20) units.

28. Tucker Properties, a Limited Partnership, with an address at P.O. Box 100, Carbondale, Kansas 66414, entered into one contract for one post-1979 loan for rental housing at the following project known as:

(i) Valley View Village, consisting of sixteen (16) units.

29. Tucker Properties II, a Limited Partnership, with an address at P.O. Box 100, Carbondale, Kansas, 66414, entered into one contract for one post-1979 loan for rental housing at the following project known as:

(i) Dogwood Glen, consisting of twenty-four (24) units.

30. Valley Associates, a Limited Partnership, with an address at P.O. Box 226, Taylors Falls, Minnesota 55084, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Rolling Hills Apartments, consisting of forty-eight (48) units.

31. Brian E. Wells, with an address at 3210 Heatherdell Lane, Madison, Wisconsin 53713, entered into one contract for one pre-1979 loan for rental housing at the following project known as:

(i) Fall River I, consisting of sixteen (16) units; and one contract for one post-1979 loan for rental housing at the following project known as:

(ii) Fall River II, consisting of eight (8) units.

(Party Defendant)

12. FmHA is an agency of the defendant. At all times relevant to the allegations in this Complaint, FmHA and its

respective officials and employees were acting as agents of the defendant. Pursuant to the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, § 233, 108 Stat. 3178 (1994), the Secretary of the Department of Agriculture was authorized to establish a successor agency to Farmers Home Administration known as Rural Housing and Community Development Services ("RHCDS"). Effective January 30, 1996, RHCDS changed its name to Rural Housing Service ("RHS"). (Agency Name Change, 61 Fed. Reg. 2899 (1996).) RHS is itself part of the area within the Department of Agriculture known as "Rural Development." As used herein, "FmHA" shah refer to Farmers Home Administration or its successor agencies, as appropriate.

13. An actual controversy exists between the parties.

JURISDICTION

14. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1491.

BACKGROUND

15. Prior to the 1960s, Congress sought to provide low-income housing primarily by subsidizing projects developed, owned, and managed by local government public housing authorities. During the 1960s and the 1970s, Congress changed its approach and enacted legislation to encourage private developers to construct, own, and manage large numbers of federally assisted housing units for low- and moderate-income residents.

16. In furtherance of this changed approach, Congress authorized FmHA to make or insure loans to private entities in order to stimulate the private development of federally assisted housing for low- and moderate-income and elderly residents in rural areas of the United States. Congress began this program in 1962 by adding Sectio 515 to the Housing

Act of 1949 (Pub. L. No. 87-723, § 4(b), 76 Stat. 671 (1962)) and expanded its scope in 1968 by adding Section 521 to that Act (Pub. L. No. 90-448, Tit. X, § 1001, 82 Stat. 551 (1968))(now codified at 42 U.S.C. §§ 1485 and 1490a, respectively). Housing projects subject to Sections 515 and/or 521 of the Housing Act of 1949 are referred to herein as "FmHA projects."

17. Each of the plaintiffs (or their predecessors-in-interest) owning FmHA projects agreed, under Sections 515 and/or 521 of the Housing Act of 1949, as amended, 42 U.S.C. §§ 1485 and 1490a, to construct, rehabilitate, or improve housing projects and to enter into Loan Agreements with FmHA. The Loan Agreements, *inter alia*, imposed significant obligations on plaintiffs regarding the tenants to whom plaintiffs could rent, the rents they could charge, the profits they could receive, and the maintenance and financial operation of each project ("the low income affordability restrictions").

18. Contemporaneous with the execution of the Loan Agreement, and referenced therein, each plaintiff (or its predecessor-in-interest) owning an FmHA project executed, *inter alia*, a Promissory Note and Real Estate Mortgage. In executing the Promissory Note, each plaintiff promised to pay to the order of the Government, in scheduled installments, the entire principal due pursuant to the Loan Agreement, together with interest at a specified rate. The Promissory Note provided, *inter alia*, "Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower."

19. By signing the Loan Agreements and the Promissory Notes referenced therein, plaintiffs promised, *inter alia*, (i) to construct and maintain housing in accordance with FmHA's specifications; (ii) to use their FmHA projects for the purpose of housing people eligible for occupancy as provided by Section 515 and appropriate FmHA regulations; (iii) to charge no higher rents than those permitted by

FmHA; (iv) to make timely payments on their mortgages; and (v) to maintain certain cash reserves. In exchange, the Government agreed to allow plaintiffs to free themselves of FmHA's regulatory strictures in accordance with the contractual provisions of the Promissory Notes subject to FmHA's present regulations and to its future regulations not inconsistent with the express provisions of the Notes.

20. The Loan Agreements obligate the plaintiffs to operate their housing projects in accordance with FmHA regulatory strictures only so long as plaintiffs' indebtedness and other obligations under the Promissory Note, Real Estate Mortgage, and any related agreement remain unsatisfied. Thus, a plaintiff's obligation under the Loan Agreement to operate its housing project in accordance with FmHA regulations expires upon that plaintiff's prepayment in full of its indebtedness and satisfaction of any related obligations.

21. Consistent with the language of the Promissory Note, FmHA regulations codified at, *inter alia*, parts 1865, 1866, and 1965, implementing Section 502 of the Housing Act of 1949, 42 U.S.C. § 1472, permitted plaintiffs to prepay their mortgages at any time at their option, so long as they and their successors in interest continued to comply with the restrictive-use clause, if any, contained in the Real Estate Mortgage.

22. Accordingly, plaintiffs were entitled under their Loan Agreements with FmHA, FmHA's regulations, and their respective Promissory Notes, to terminate their contracts by prepaying their mortgages at any time at their option to enable them to go to market and maximize their return on investment.

23. Notwithstanding plaintiffs' contractual right to terminate their participation in the Government's housing programs, the Government permanently repudiated its obligation to recognize plaintiffs' right by enacting the 1992 legislation described below.

CONGRESSIONAL ACTION

The 1988 Legislation

24. On February 5, 1988, Congress imposed emergency interim measures repudiating the right of pre-1979 FmHA contract holders to exercise their contractual termination right at any time at their option by enacting Title II of the Housing and Community Development Act of 1987. (Pub. L. No. 100-242, 101 Stat. 1877 (1988), cited as the Emergency Low Income Housing Preservation Act of 1987 (codified as amended at 42 U.S.C. § 1472(c) and 12 U.S.C. § 1715l note)("the 1988 legislation" or "ELIHPA").) Congress made certain findings in the 1988 legislation, including but not limited to the following:

> (i) some 150,000 units of rural low income housing financed under section 515 of the Housing Act of 1949 i.e., FmHA housing units] are threatened with loss as a result of the prepayment of mortgages by owners;
> (ii) the loss of this privately owned and federally assisted housing would occur in a period of sharply rising rents on unassisted housing and extremely low production of additional low rent housing;
> (iii) a major review of alternative responses to this threatened loss of affordable housing is now being undertaken by numerous private sector task forces as well as State and local organizations;
> (iv) until the Congress can act on recommendations that will emerge from this review, interim measures are needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants.

The 1988 legislation, Section 202(a) (emphasis supplied).

(The 1988 Legislation's Interim Measures For Pre-1979 FmHA Contracts)

25. Congress estimated that a large portion of the 367,000 units owned by both pre-1979 and post-1979 loan holders and originating between 1963 and 1985 were vulnerable to being prepaid during the few years following 1988. However, post-1979 FmHA loan holders, which unlike pre-1979 loan holders already were contractually required to maintain their projects as low- and moderate-income housing for fifteen (15) or twenty (20) years, were the subject of continuing reviews of alternative responses to the perceived imminent loss of affordable housing. Thus, until such time as Congress could act on recommendations and devise a permanent solution for all FmHA loans, the 1988 legislation temporarily confined itself to dealing only with the pre-1979 FmHA loans, i.e., those FmHA loans originating from 1963 to 1979.

26. The 1988 legislation constituted an interim measure designed to temporarily place the pre-1979 FmHA contract holders "on the same playing field" as the post-1979 FmHA contract holders already subject to a restrictive-use clause. For example, a pre-1979 FmHA contract holder could avoid an immediate forced sale of its project by agreeing to extend its low-income use for a period of not less than twenty (20) years from the date of loan origination. The 1988 Legislation, Section 241.

27. Although denominated as an "interim measure," the 1988 legislation specifically amended existing law -- Section 502(c) of the Housing Act of 1949 -- and did not contain a sunset provision. Congress did not revisit this issue and devise a permanent response for all FmHA loans, including those post-1979 loans with contractual termination rights, until 1992.

28. Consistent with the provisions of existing post-1979 FmHA contracts containing restrictive-use clauses, the interim measures of the 1988 legislation temporarily

recognized the contractual right of post-1979 FmHA loan holders to terminate their contracts by prepaying their loans at any time at their option provided that the projects were maintained as low- and moderate-income housing for a period of fifteen (15) or twenty (20) years from the date of loan origination.

29. Contrary to the provisions of pre-1979 FmHA contracts, the interim measures of the 1988 legislation repudiated the contractual right of said contract holders to terminate their contracts at any time at their option. The 1988 Legislation, Section 241.

The 1992 Legislation

30. On October 28, 1992, Congress amended Section 502(c) of the Housing Act of 1949 by enacting the Housing and Community Development Act of 1992 (Pub. L. No. 102-550, § 2 & Tit. VII, § 712, 106 Stat. 3681, 3841 (1992)(codified in relevant part at 42 U.S.C. § 1472(c))("the 1992 legislation or Title VII").) This amendment eliminated the interim measure status of the 1988 legislation's emergency provisions repudiating the contractual right of pre-1979 FmHA loan holders to terminate their contracts at any time at their option.

31. In addition to making permanent the temporary repudiation of the contractual termination rights of pre-1979 FmHA loan holders, the 1992 legislation extended said repudiation to those post-1979 FmHA loan holders with the same contractual rights. (42 U.S.C. § 1472(c)(4)(A), as amended.) Thus, the 1992 legislation, signed into law by the President on November 2, 1992, together with implementing regulations, repudiates the contractual termination right of any FmHA loan holder who chooses to terminate its contract.

32. Pursuant to the 1992 legislation, holders of both pre-1979 and post-1979 FmHA contracts are permitted to terminate their contracts by prepaying their loans only in accordance with specified, non-contractual restrictions,

including but not limited to the requirement that, before accepting any offer to prepay, the Secretary must make reasonable efforts to enter into an agreement to extend the low-income use of FmHA projects for not less than a period of twenty (20) years beginning on the date the agreement is executed. The 1992 Legislation, Section 712, 42 U.S.C. § 1472(c)(4)(A).

33. The 1992 legislation authorizes FmHA, subject to various conditions and at its discretion, to offer limited, specified "incentives" to holders of FmHA contracts which, along with the threat of the forced property sales discussed below, are designed to induce said contract holders to extend the low-income use of their projects. In general, the incentives allowed owners whose projects satisfied various guidelines to apply for: (i) increases in the rate of return on investment; (ii) reductions of the interest rate on the mortgage loan; (iii) additional rental assistance; and (iv) an equity loan. 42 U.S.C. § 1472(c)(4)(B).

34. The appraisal guidelines used, by FmHA to determine incentives are inconsistent with standard appraisal guidelines and result in value determinations below fair market value.

35. For those FmHA project owners unwilling or unable to extend their participation in the Government's housing programs by acquiescing to the "incentives" outlined above, the 1992 legislation provides for forced sales of said owners' properties to nonprofit organizations or public agencies approved by FmHA which are required to maintain the projects as low income housing, subject to FmHA's approval of financial assistance to the prospective purchasers. Under the lengthy, cumbersome, and costly procedures required, such owners are required to offer their properties for sale to such purchasers for an extended period without receiving "incentives" or any other compensation. 42 U.S.C. § 1472(c)(5)(A) - (F).

36. Such forced sale proceedings can be avoided only if (i) the FmHA project owner agrees to continue to operate its project as low-income housing for a period determined by the Secretary, but not less than twenty (20) years from the date of loan origination, and to subject itself to the forced sale proceeding at the end of that period; or (ii) if the Secretary determines that housing opportunities for minorities will not be materially affected as a result of the prepayment and that either (a) tenants will not be displaced; or (b) there is an adequate supply of affordable rental housing within the market area of the housing that is assured of being made available to all current tenants. 42 U.S.C. § 1472(c)(5)(G).

Material Terms

37. Plaintiffs' contractual right to terminate their contracts at any time at their option was a material term of their contracts. In the absence of this contractual termination right, plaintiffs would not have entered into their contracts with FmHA. But for the 1992 legislation permanently repudiating plaintiffs' contractual termination right, plaintiffs would achieve their option of terminating their contracts on those dates that would maximize their investment return on their properties, or on such other dates as they deem appropriate given their individual circumstances.

38. Plaintiffs have complied fully and in good faith in all material respects with the terms and conditions of their contracts and have otherwise fully performed their undertakings in connection therewith.

THE IMPACT OF THE 1992 LEGISLATION UPON PLAINTIFFS

39. The statutory scheme under the 1992 legislation and FmHA's implementing regulations repudiate the contractual right of FmHA project owners to terminate their contracts at

any time at their option in part by (i) compelling them to extend the low-income use of their projects; and (ii) subjecting them to forced sales of their properties. The Government's repudiation does not constitute a failure to carry out any immediate duty of present performance unless and until the date of Government performance required by each contract arrives, i.e., the date that any FmHA contract holder would have achieved its option of terminating its contract but for the Government's repudiation. Thus, the Government's scheme constitutes an anticipatory repudiation of the plaintiffs' contractual termination right.

40. The 1992 legislation complained of herein also results in a taking of plaintiffs' property for public use without just compensation. By requiring plaintiffs to house low-income tenants and to accept new low-income tenants, the Government has (i) conscripted plaintiffs' properties for public use; (ii) physically invaded or authorized others to physically invade plaintiffs' properties; and (iii) deprived plaintiffs of their distinct investment-backed expectations with regard to their properties, all without providing any just compensation.

DAMAGES

41. As a consequence of the Government's conduct, certain plaintiffs have submitted applications for prepayment and/or an offer of incentives from the Government. The Government has in every instance refused to accept prepayment from plaintiffs pursuant to the provisions of their contracts. Some plaintiffs have been compelled to change their position to their detriment in reliance upon the Government's repudiation, including accepting incentives and transferring their properties to third parties in lieu of a sale at fair market value. In light of the Government's repudiation, other plaintiffs have foregone submitting any prepayment application because of the futility of doing so.

42. As a consequence of the Government's conduct, certain plaintiffs have met with, or otherwise made inquiries of, FmHA officials regarding prepayment of their loans. Said Government officials have repeatedly represented to plaintiffs that prepayment will not be accepted. In some cases, Government officials have stated that it is not worthwhile even to file a prepayment application. Further, Government officials who are in positions of authority, trust, and confidence with respect to plaintiffs have represented to plaintiffs that they do not have and never had a contractual right to prepayment, that their contracts were subject to all future regulatory changes, including prepayment prohibitions, and have made various other misrepresentations and misstatements of fact.

43. In addition, during the period of emergency interim measures described above, Government officials led certain plaintiffs to believe that permanent legal and/or regulatory changes currently under review would be made which would remove or significantly liberalize the temporary prepayment restrictions.

44. The incentives potentially provided by the 1992 legislation and implementing regulations fall far short of compensating plaintiffs for the damages they have suffered and will continue to suffer as a result of the Government's repudiation of its contracts with plaintiffs, and would not provide just compensation to plaintiffs for the taking of their property for public use.

45. FmHA has acted arbitrarily and capriciously and not in accordance with law by failing to promulgate regulations and appraisal guidelines that justly compensate plaintiffs for the damages they have suffered and for the taking of their property for public use.

46. As a result of the Government's repudiation of their contractual termination right, plaintiffs have been (i) deprived of their right to use or dispose of their property as they see fit; (ii) compelled to allow the Government to use or

authorize others to purchase and use their property to fulfill the Government's undertaking to provide low cost rental housing to a segment of the public meeting Government eligibility standards; and (iii) required to continue to comply with the costly restrictions and obligations imposed upon them by their Loan Agreements.

47. But for the Government's conduct, certain plaintiffs would have terminated their contracts by prepaying their mortgage loans and selling their properties to third parties. The Government has deprived and will deprive these plaintiffs of earnings on the sales of their properties because its repudiation of plaintiffs' contractual termination right has prevented any prepayment, and consequently any sale, from taking place.

48. But for the Government's conduct, certain plaintiffs would have terminated their contracts by prepaying their mortgage loans and converting their properties into commercial housing in which they could obtain rents at market rates in excess of the rents chargeable to low- and moderate-income tenants under the Government's programs. The Government has deprived and will deprive these plaintiffs of the value of increased rents they would receive because its repudiation of plaintiffs' contractual termination right has prevented any prepayment, and consequently any increase in rents, from taking place.

49. All plaintiffs have suffered other, additional damages including without limitation (i) diminutions in the fair market value of their properties as a direct and proximate result of the Government's repudiation of plaintiffs' contractual termination right and the extended restrictions on the profitable use of their properties; (ii) the costs associated with continuing to operate under and comply with rules and regulations associated with the Government's housing programs; and (iii) the lost opportunity costs associated with investment and business opportunities plaintiffs have been foreclosed from pursuing

by virtue of their inability to exercise their contractual right to terminate their contracts at any time at their option.

COUNT ONE

(Breach of Contract)

50. Plaintiffs incorporate paragraphs 1 through 49 by reference as if fully set forth herein.

51. Defendant's 1992 legislation anticipatorily repudiated the contract between the defendant and each of the plaintiffs. The Government's anticipatory repudiation has deprived and will deprive each plaintiff of its contractual right to terminate its contract at any time at its option before the expiration date of its forty (40) or fifty (50) year contract term. The Government's anticipatory repudiation constitutes a breach of each plaintiff's contract as of the date of Government performance required by each contract, i.e., the date that each plaintiff would terminate its contract but for the Government's repudiation.

52. As a direct and proximate result of defendant's conduct, plaintiffs have been damaged in an amount which will be proven at trial. Plaintiffs are continuing to suffer injury and resulting damages each day that they are denied the ability to exercise their contractual termination right and go to market with their properties at any time at their option.

COUNT TWO

(Just Compensation)

53. Plaintiffs incorporate paragraphs 1 through 52 by reference as if fully set forth herein.

54. As of the date of Government performance required by each contract entered into between defendant and the plaintiffs, defendant's conduct constitutes a taking of plaintiffs' properties for public use and requires payment to

plaintiffs of just compensation under the Fifth Amendment to the U.S. Constitution.

55. Plaintiffs are entitled to just compensation for the taking of their properties in an amount which will be proven at trial. Plaintiffs are continuing to suffer injury and resulting damages each day that they are denied the ability to exercise their contractual termination right and go to market with their properties at any time at their option.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment as follows:

AS TO COUNT ONE

1. That the Court award plaintiffs monetary relief for the damages suffered to date and for the damages plaintiffs continue to suffer as a result of defendant's breaches of plaintiffs' contracts, in an amount to be determined at trial.

AS TO COUNT TWO

2. That the Court award plaintiffs just compensation during the period during which plaintiffs' properties have been taken for public use by defendant, in an amount to be determined at trial.

AS TO ALL COUNTS

3. That the Court award plaintiffs their attorneys' fees and expenses as allowed pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 et seq., the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4654(c), and other applicable law.

4. That the Court award plaintiffs their costs and interest as allowed by law.

5. That the Court grant such other and further relief as the law and the evidence may justify and as the Court may deem just and proper.

Respectfully submitted,

Dated: June 25, 1997

By: /s/_____
Jeff H. Eckland
Attorney for Plaintiffs

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M2:20108845.01

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(1) GRASS VALLEY TERRACE, A CALIFORNIA LIMITED PARTNERSHIP
c/o Rooftree, Inc.
697 South Blackhawk Blvd.
Rockton, Illinois 61072

COMPLAINT FOR BREACH OF CONTRACT AND JUST COMPENSATION

(2) JEFFERSON COMMONS, A LIMITED PARTNERSHIP
c/o Rooftree, Inc.
697 South Blackhawk Blvd.
Rockton, Illinois 61072

File No._____

(3) MARGORIE W. KASSNER
1003 Mesa Drive
Douglas, Wyoming 82633

(4) EILEEN KOTHE
1714 Frank Street
Maplewood, Minnesota 55109

(5) NRCB LIMITED PARTNERSHIP
18745 NE 109th Street
Redmond. Washington 98052

(6) PETERS, WILLIAMS & KUBOTA, A GENERAL PARTNERSHIP
1310 Wakarusa Drive
Lawrence, Kansas 66049-3845

(7) PINE NEEDLE APARTMENTS LIMITED PARTNERSHIP

Suite 201 Forest Center
932 Hendersonville Road
Asheville, North Carolina
28803-1761

(8) RIPON MANOR, A LIMITED PARTNERSHIP
c/o Rooftree, Inc.
697 South Blackhawk Blvd.
Rockton, Illinois 61072

(9) RURAL COMMUNITY BUILDERS, A LIMITED PARTNERSHIP
18745 NE 109th Street
Redmond, Washington 98052

(10) RICHARD AND BEATRICE SCHMIDTBAUER
15845 State Highway 15
Hutchinson, Minnesota 55350

(11) THE HIGHLANDS, A LIMITED PARTNERSHIP
c/o Rooftree, Inc.
697 South Blackhawk Blvd.
Rockton, Illinois 61072

(12) WATERLOO GREEN, A LIMITED PARTNERSHIP
c/o Rooftree, Inc.
697 South Blackhawk Blvd.
Rockton, Illinois 61072

INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

For their Complaint against the defendant United States of America, plaintiffs state and allege as follows:

PRELIMINARY ALLEGATIONS

1. Each of the plaintiffs contracted with the United States of America ("the Government") for a loan to provide rental housing for low- and moderate-income persons ("the housing programs"). The Government entered into these contracts ("the contracts") with plaintiffs by and through its agency, the Farmers Home Administration, United States Department of Agriculture ("FmHA").

2. While the precise terms of these contracts vary, all of them permitted each contracting plaintiff to terminate its participation in the Government's housing programs "at the option" of plaintiff upon prepayment of each housing project's federally made or insured mortgage. Pursuant to the contracts, said optional termination rights could be exercised by plaintiffs "at any time- prior to the termination of the forty (40) or fifty (50) year terms of their contracts.

3. Congress in 1992 enacted legislation that purports to permanently repudiate the Government's contractual obligation to permit FmHA contract holders to terminate

their contracts at any time at their option. As is alleged more fully below, plaintiffs contend in this action that the enactment of the 1992 legislation anticipatorily repudiates the contract between defendant and each of the plaintiffs. As is their right, plaintiffs have elected to treat the Government's anticipatory repudiation as a breach of contract as of the date of Government performance required by each contract, i.e., the date that each plaintiff would achieve its option of terminating its contract but for the Government's repudiation. Plaintiffs also allege that said legislation results in a taking of each plaintiff's property without just compensation.

4. Plaintiffs seek to recover in this action the damages they have suffered and continue to suffer as a result of the breaches by the Government of plaintiffs' contracts and for just compensation for the taking of their properties.

(Pre-1979 FmHA Contracts)

5. Plaintiffs that entered into FmHA contracts before December 21, 1979 ("the pre-1979 FmHA contracts"), are contractually entitled to terminate their participation in the Government's housing program by exercising their option to prepay at any time. Such a prepayment would enable such plaintiffs to "go to market" and use or dispose of their property by either (i) raising the property's rents to commercial rates; or (ii) selling the property for its commercial fair market value.

6. The 1992 legislation described below made permanent certain emergency interim measures repudiating the contractual right of pre-1979 FmHA contract holders to terminate their contracts at any time at their option.

(Post-1979 FmHA Contracts)

7. Plaintiffs that entered into FmHA contracts on or after December 21, 1979 ("the post-1979 FmHA contracts"),

also are contractually entitled to exercise their option to prepay at any time. However, by their terms all post-1979 FmHA contracts are subject to a fifteen (15) or twenty (20) year restrictive use clause. This clause is binding upon the owners and their successors in interest and requires that the property be operated as low-rent housing for a period of fifteen (15) or twenty (20) years from the date of loan origination.

8. Accordingly, if a holder of a post-1979 FmHA contract intends to terminate its contract and raise its property's rents to commercial rates it must wait until on or after the end of the fifteen (15) or twenty (20) year period from the origination date of its mortgage loan to do so. Alternatively, if the holder of such a contract intends to terminate its contract and sell its property to a third party who will retain low rents for the remainder of the fifteen (15) or twenty (20) year period commencing upon loan origination, such a contract holder is contractually entitled to exercise its termination right and go to market at any time.

9. The 1992 legislation described below extended to post-1979 FmHA contract holders the interim measures that had repudiated the contractual termination right of pre-1979 FmHA contract holders, and made such measures permanent.

THE PARTIES

(Parties Plaintiff)

10. Each of the plaintiffs is a general or limited partnership, a corporation, an individual, or other legal entity which entered into a contract with FmHA for a loan to provide rental housing for low- and moderate-income residents meeting Government eligibility standards.

Rule 20(a) List

11. Pursuant to Rule 20(a) of the Rules of the Court of Federal Claims, the following comprises an alphabetized, numbered list of all said plaintiffs. The plaintiffs entered into contracts categorized by the Government as either a pre-1979 or a post-1979 contract:

1. Grass Valley Terrace, a California Limited Partnership, with an address at c/o Rooftree, Inc., 697 South Blackhawk Boulevard, Rockton, Illinois 61072, entered into one contract for rental housing at the following project known as:

(i) Grass Valley Terrace, consisting of seventy (70) units.

2. Jefferson Commons, a Limited Partnership, with an address at c/o Rooftree, Inc., 697 South Blackhawk Boulevard, Rockton, Illinois 61072, entered into one contract for rental housing at the following project known as:

(i) Jefferson Commons, consisting of twenty-four (24) units.

3. Marjorie W. Kassner, with an address at 1003 Mesa Drive, Douglas, Wyoming 82633, entered into one contract for rental housing at the following project known as:

(i) Wyandot Village Apartments, consisting of forty-eight (48) units.

4. Eileen Kothe, with an address at 1714 Frank Street, Maplewood, Minnesota 55109, entered into two contracts for rental housing at the following projects known as:

(i) D&G Apartments #l, consisting of eight (8) units; and

(ii) D&G Apartments #2, consisting of eight (8) units.

5. NRCB Limited Partnership, with an address at 18745 NE 109th Street, Redmond, Washington 98052, entered into three contracts for rental housing at the following projects known as:

(i) Wishing Well I Apartments, consisting of forty (40) units;

(ii) Friendship House I, consisting of thirty-five (35) units; and

(iii) Windsor Park, consisting of thirty-two (32) units.

6. Peters, Williams & Kubota, a General Partnership, with an address at 1310 Wakarusa Drive, Lawrence, Kansas 66049-3045, entered into three contracts for rental housing at the following projects known as:

(i) Maplewood I Apartments, consisting of twelve (12) units;

(ii) Maplewood II Apartments, consisting of twelve (12) units; and

(iii) Brentwood Apartments, consisting of twenty-eight (28) units.

7. Pine Needle Apartments, Limited Partnership, with an address at Suite 201, Forest Center, 932 Hendersonville Road, Asheville, North Carolina 28803-1761, entered into one contract for rental housing at the following project known as:

(i) Pine Needle Apartments, consisting of forty-six units.

8. Ripon Manor, a Limited Partnership, with an address at c/o Rooftree, Inc., 697 South Blackhawk Boulevard, Rockton, Illinois 61072, entered into one contract for rental housing at the following project known as:

(i) Ripon Manor, consisting of thirty-two (32) units.

9. Rural Community Builders, a Limited Partnership, with an address at 18745 NE 109th Street, Redmond, Washington 98052, entered into one contract for rental housing at the following project known as:

(i) Friendship House II, consisting of twenty-nine (29) units.

10. Richard and Beatrice Schmidtbauer, with an address at 15848 State Highway 15, Hutchinson, Minnesota 55350, entered into one contract for rental housing at the following project known as:

(i) Plaza I Apartments, consisting of twelve (12) units.

11. The Highlands, a Limited Partnership, with an address at c/o Rooftree, Inc., 697 South Blackhawk Boulevard, Rockton, Illinois 61072, entered into one contract for rental housing at the following project known as:

(i) The Highlands, consisting of eighty-eight (88) units.

12. Waterloo Green, a Limited Partnership, with an address at c/o Rooftree, Inc., 697 South Blackhawk Boulevard, Rockton, Illinois 61072, entered into one contract for rental housing at the following project known as:

(i) Waterloo Green, consisting of twenty-four (24) units.

(Party Defendant)

12. FmHA is an agency of the defendant. At all times relevant to the allegations in this Complaint, FmHA and its respective officials and employees were acting as agents of the defendant. Pursuant to the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, § 233, 108 Stat. 3178 (1994), the Secretary of the Department of agriculture was authorized to establish a successor agency to Farmers Home Administration known as Rural Housing and Community Development Services ("RHCDS"). Effective January 30, 1996, RHCDS changed its name to Rural Housing Service ("RHS"). (Agency Name Change, 61 Fed. Reg. 2899 (1996).) RHS is itself part of the area within the Department of Agriculture known as "Rural Development." As used herein, "FmHA" shall refer to Farmers Home Administration or its successor agencies, as appropriate.

13. An actual controversy exists between the parties.

CLASS ACTION ALLEGATIONS

14. Plaintiffs bring this action on their own behalves and as a class action pursuant to Rule 23 of the Rules of the Court of Federal Claims on behalf of all similarly situated persons.

15. All of the criteria for class certification are met in this action, in that:

(a) Members constitute a large but manageable class;

(b) There are questions of law common to the whole class;

(c) Common legal issues override separate factual issues effecting individual members;

(d) Claims of the party plaintiffs are typical of claims of the Class;

(e) The Government has acted on grounds generally applicable to the whole Class;

(f) The claims of many claimants are so small that it is doubtful they would be otherwise pursued;

(g) The party plaintiffs adequately and fairly protect the interests of the Class without conflicts of interest;

(h) The prosecution of individual lawsuits would create a risk of inconsistent or varying adjudications;

(i) A class action in these circumstances will avoid repetitious lawsuits, provide for the more effective management of the issues, and aid a speedier and more just resolution of the claims involved.

JURISDICTION

16. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1491.

BACKGROUND

17. Prior to the 1960s, Congress sought to provide low-income housing primarily by subsidizing projects developed, owned, and managed by local government public housing authorities. During the 1960s and the 1970s, Congress changed its approach and enacted legislation to encourage private developers to construct, own, and manage large numbers of federally assisted housing units for low- and moderate-income residents.

18. In furtherance of this changed approach, Congress authorized FmHA to make or insure loans to private entities in order to stimulate the private development of federally assisted housing for low- and moderate-income and elderly residents in rural areas of the United States. Congress began this program in 1962 by adding Section 515 to the Housing Act of 1949 (Pub. L. No. 87-723, § 4(b), 76 Stat. 671 (1962)) and expanded its scope in 1968 by adding Section 521 to that Act (Pub. L. No. 90-448, Tit. X, § 1001, 82 Stat. 551 (1968))(now codified at 42 U.S.C. §§ 1485 and 1490a, respectively). Housing projects subject to Sections 515 and/or 521 of the Housing Act of 1949 are referred to herein as "FmHA projects."

19. Each of the plaintiffs (or their predecessors-in-interest) owning FmHA projects agreed, under Sections 515 and/or 521 of the Housing Act of 1949, as amended, 42 U.S.C. §§ 1485 and 1490a, to construct, rehabilitate, or improve housing projects and to enter into Loan Agreements with FmHA. The Loan Agreements, *inter alia*, imposed significant obligations on plaintiffs regarding the tenants to whom plaintiffs could rent, the rents they could charge, the profits they could receive, and the maintenance and financial operation of each project ("the low income affordability restrictions").

20. Contemporaneous with the execution of the Loan Agreement, and referenced therein, each plaintiff (or its predecessor-in-interest) owning an FmHA project executed,

inter alia, a Promissory Note and Real Estate Mortgage. In executing the Promissory Note, each plaintiff promised to pay to the order of the Government, in scheduled installments, the entire principal due pursuant to the Loan Agreement, together with interest at a specified rate. The Promissory Note provided, *inter alia*, "Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower."

21. By signing the Loan Agreements and the Promissory Notes referenced therein, plaintiffs promised, *inter alia*, (i) to construct and maintain housing in accordance with FmHA's specifications; (ii) to use their FmHA projects for the purpose of housing people eligible for occupancy as provided by Section 515 and appropriate FmHA regulations; (iii) to charge no higher rents than those permitted by FmHA; (iv) to make timely payments on their mortgages; and (v) to maintain certain cash reserves. In exchange, the Government agreed to allow plaintiffs to free themselves of FmHA's regulatory strictures in accordance with the contractual provisions of the Promissory Notes subject to FmHA's present regulations and to its future regulations not inconsistent with the express provisions of the Notes.

22. The Loan Agreements obligate the plaintiffs to operate their housing projects in accordance with FmHA regulatory strictures only so long as plaintiffs' indebtedness and other obligations under the Promissory Note, Real Estate Mortgage, and any related agreement remain unsatisfied. Thus, a plaintiff's obligation under the Loan Agreement to operate its housing project in accordance with FmHA regulations expires upon that plaintiff's prepayment in full of its indebtedness and satisfaction of any related obligations.

23. Consistent with the language of the Promissory Note, FmHA regulations codified at, *inter alia*, parts 1865, 1866, and 1965, implementing Section 502 of the Housing Act of 1949, 42 U.S.C. § 1472, permitted plaintiffs to prepay their mortgages at any time at their option, so long as they and

their successors in interest continued to comply with the restrictive-use clause, if any, contained in the Real Estate Mortgage.

24. Accordingly, plaintiffs were entitled under their Loan Agreements with FmHA, FmHA's regulations, and their respective Promissory Notes, to terminate their contracts by prepaying their mortgages at any time at their option to enable them to go to market and maximize their return on investment.

25. Notwithstanding plaintiffs' contractual right to terminate their participation in the Government's housing programs, the Government permanently repudiated its obligation to recognize plaintiffs' right by enacting the 1992 legislation described below.

CONGRESSIONAL ACTION

The 1988 Legislation

26. On February 5, 1988, Congress imposed emergency interim measures repudiating the right of pre-1979 FmHA contract holders to exercise their contractual termination right at any time at their option by enacting Title II of the Housing and Community Development Act of 1987. (Pub. L. No. 100-242, 101 Stat. 1877 (1988), cited as the Emergency Low Income Housing Preservation Act of 1987 (codified as amended at 42 U.S.C. § 1472(c) and 12 U.S.C. § 1715*l* note)("the 1988 legislation" or "ELIHPA").) Congress made certain findings in the 1988 legislation, including but not limited to the following:

> (i) some 150,000 units of rural low income housing financed under section 515 of the Housing Act of 1949 [i.e., FmHA housing units] are threatened with loss as a result of the prepayment of mortgages by owners;

> (ii) the loss of this privately owned and federally assisted housing would occur in a period of sharply rising rents on unassisted housing and extremely low production of additional low rent housing;
> (iii) a major review of alternative responses to this threatened loss of affordable housing is now being undertaken by numerous private sector task forces as well as State and local organizations;
> (iv) until the Congress can act on recommendations that will emerge from this review, interim measures are needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants.

The 1988 legislation, Section 202(a) (emphasis supplied).

(The 1988 Legislation's Interim Measures For Pre-1979 FmHA Contracts)

27. Congress estimated that a large portion of the 367,000 units owned by both pre-1979 and post-1979 loan holders and originating between 1963 and 1985 were vulnerable to being prepaid during the few years following 1988. However, post-1979 FmHA loan holders, which unlike pre-1979 loan holders already were contractually required to maintain their projects as low- and moderate-income housing for fifteen (15) or twenty (20) years, were the subject of continuing reviews of alternative responses to the perceived imminent loss of affordable housing. Thus, until such time as Congress could act on recommendations and devise a permanent solution for all FmHA loans, the 1988 legislation temporarily confined itself to dealing only with the pre-1979 FmHA loans, i.e., those FmHA loans originating from 1963 to 1979.

28. The 1988 legislation constituted an interim measure designed to temporarily place the pre-1979 FmHA contract holders "on the same playing field" as the post-1979 FmHA

contract holders already subject to a restrictive-use clause. For example, a pre-1979 FmHA contract holder could avoid an immediate forced sale of its project by agreeing to extend its low-income use for a period of not less than twenty (20) years from the date of loan origination. The 1988 Legislation, Section 241.

29. Although denominated as an "interim measure," the 1988 legislation specifically amended existing law -- Section 502(c) of the Housing Act of 1949 -- and did not contain a sunset provision. Congress did not revisit this issue and devise a permanent response for all FmHA loans, including those post-1979 loans with contractual termination rights, until 1992.

30. Consistent with the provisions of existing post-1979 FmHA contracts containing restrictive-use clauses, the interim measures of the 1988 legislation temporarily recognized the contractual right of post-1979 FmHA loan holders to terminate their contracts by prepaying their loans at any time at their option provided that the projects were maintained as low- and moderate-income housing for a period of fifteen (15) or twenty (20) years from the date of loan origination.

31. Contrary to the provisions of pre-1979 FmHA contracts, the interim measures of the 1988 legislation repudiated the contractual right of said contract holders to terminate their contracts at any time at their option. The 1988 Legislation, Section 241.

The 1992 Legislation

32. On October 28, 1992, Congress amended Section 502(c) of the Housing Act of 1949 by enacting the Housing and Community Development Act of 1992 (Pub. L. No. 102-550, § 2 & Tit. VII, § 712, 106 Stat. 3681, 3841 (1992)(codified in relevant part at 42 U.S.C. § 1472(c))("the 1992 legislation or Title VII").) This amendment eliminated the interim measure status of the 1988 legislation's emergency provisions

repudiating the contractual right of pre-1979 FmHA loan holders to terminate their contracts at any time at their option.

33. In addition to making permanent the temporary repudiation of the contractual termination rights of pre-1979 FmHA loan holders, the 1992 legislation extended said repudiation to those post-1979 FmHA loan holders with the same contractual rights. (42 U.S.C. § 1472(c)(4)(A), as amended.) Thus, the 1992 legislation, signed into law by the President on November 2, 1992, together with implementing regulations, repudiates the contractual termination right of any FmHA loan holder who chooses to terminate its contract.

34. Pursuant to the 1992 legislation, holders of both pre-1979 and post-1979 FmHA contracts are permitted to terminate their contracts by prepaying their loans only in accordance with specified, non-contractual restrictions, including but not limited to the requirement that, before accepting any offer to prepay, the Secretary must make reasonable efforts to enter into an agreement to extend the low-income use of FmHA projects for not less than a period of twenty (20) years beginning on the date the agreement is executed. The 1992 Legislation, Section 712, 42 U.S.C. § 1472(c)(4)(A).

35. The 1992 legislation authorizes FmHA, subject to various conditions and at its discretion, to offer limited, specified "incentives" to holders of FmHA contracts which, along with the threat of the forced property sales discussed below, are designed to induce said contract holders to extend the low-income use of their projects. In general, the incentives allowed owners whose projects satisfied various guidelines to apply for: (i) increases in the rate of return on investment; (ii) reductions of the interest rate on the mortgage loan; (iii) additional rental assistance; and (iv) an equity loan. 42 U.S.C. § 1472(c)(4)(B).

36. The appraisal guidelines used by FmHA to determine incentives are inconsistent with standard

appraisal guidelines and result in value determinations below fair market value.

37. For those FmHA project owners unwilling or unable to extend their participation in the Government's housing programs by acquiescing to the "incentives" outlined above, the 1992 legislation provides for forced sales of said owners' properties to nonprofit organizations or public agencies approved by FmHA which are required to maintain the projects as low income housing, subject to FmHA's approval of financial assistance to the prospective purchasers. Under the lengthy, cumbersome, and costly procedures required, such owners are required to offer their properties for sale to such purchasers for an extended period without receiving "incentives" or any other compensation. 42 U.S.C. § 1472(c)(5)(A) - (F).

38. Such forced sale proceedings can be avoided only if (i) the FmHA project owner agrees to continue to operate its project as low-income housing for a period determined by the Secretary, but not less than twenty (20) years from the date of loan origination, and to subject itself to the forced sale proceeding at the end of that period; or (ii) if the Secretary determines that housing opportunities for minorities will not be materially affected as a result of the prepayment and that either (a) tenants will not be displaced; or (b) there is an adequate supply of affordable rental housing within the market area of the housing that is assured of being made available to all current tenants. 42 U.S.C. § 1472(c)(5)(G).

Material Terms

39. Plaintiffs' contractual right to terminate their contracts at any time at their option was a material term of their contracts. In the absence of this contractual termination right, plaintiffs would not have entered into their contracts with FmHA. But for the 1992 legislation permanently repudiating plaintiffs' contractual termination right, plaintiffs would achieve their option of terminating their

contracts on those dates that would maximize their investment return on their properties, or on such other dates as they deem appropriate given their individual circumstances.

40. Plaintiffs have complied fully and in good faith in all material respects with the terms and conditions of their contracts and have otherwise fully performed their undertakings in connection therewith.

THE IMPACT OF THE 1992 LEGISLATION UPON PLAINTIFFS

41. The statutory scheme under the 1992 legislation and FmHA's implementing regulations repudiate the contractual right of FmHA project owners to terminate their contracts at any time at their option in part by (i) compelling them to extend the low-income use of their projects; and (ii) subjecting them to forced sales of their properties. The Government's repudiation does not constitute a failure to carry out any immediate duty of present performance unless and until the date of Government performance required by each contract arrives, i.e., the date that any FmHA contract holder would have achieved its option of terminating its contract but for the Government's repudiation. Thus, the Government's scheme constitutes an anticipatory repudiation of the plaintiffs' contractual termination right.

42. The 1992 legislation complained of herein also results in a taking of plaintiffs' property for public use without just compensation. By requiring plaintiffs to house low-income tenants and to accept new low-income tenants, the Government has (i) conscripted plaintiffs' properties for public use; (ii) physically invaded or authorized others to physically invade plaintiffs' properties; and (iii) deprived plaintiffs of their distinct investment-backed expectations with regard to their properties, all without providing any just compensation.

DAMAGES

43. As a consequence of the Government's conduct, certain plaintiffs have submitted applications for prepayment and/or an offer of incentives from the Government. The Government has in every instance refused to accept prepayment from plaintiffs pursuant to the provisions of their contracts. Some plaintiffs have been compelled to change their position to their detriment in reliance upon the Government's repudiation, including accepting incentives and transferring their properties to third parties in lieu of a sale at fair market value. In light of the Government's repudiation, other plaintiffs have foregone submitting any prepayment application because of the futility of doing so.

44. As a consequence of the Government's conduct, certain plaintiffs have met with, or otherwise made inquiries of, FmHA officials regarding prepayment of their loans. Said Government officials have repeatedly represented to plaintiffs that prepayment will not be accepted. In some cases, Government officials have stated that it is not worthwhile even to file a prepayment application. Further, Government officials who are in positions of authority, trust, and confidence with respect to plaintiffs have represented to plaintiffs that they do not have and never had a contractual right to prepayment, that their contracts were subject to all future regulatory changes, including prepayment prohibitions, and have made various other misrepresentations and misstatements of fact.

45. In addition, during the period of emergency interim measures described above, Government officials led certain plaintiffs to believe that permanent legal and/or regulatory changes currently under review would be made which would remove or significantly liberalize the temporary prepayment restrictions.

46. The incentives potentially provided by the 1992 legislation and implementing regulations fall far short of compensating plaintiffs for the damages they have suffered

and will continue to suffer as a result of the Government's repudiation of its contracts with plaintiffs, and would not provide just compensation to plaintiffs for the taking of their property for public use.

47. FmHA has acted arbitrarily and capriciously and not in accordance with law by failing to promulgate regulations and appraisal guidelines that justly compensate plaintiffs for the damages they have suffered and for the taking of their property for public use.

48. As a result of the Government's repudiation of their contractual termination right, plaintiffs have been (i) deprived of their right to use or dispose of their property as they see fit; (ii) compelled to allow the Government to use or authorize others to purchase and use their property to fulfill the Government's undertaking to provide low cost rental housing to a segment of the public meeting Government eligibility standards; and (iii) required to continue to comply with the costly restrictions and obligations imposed upon them by their Loan Agreements.

49. But for the Government's conduct, certain plaintiffs would have terminated their contracts by prepaying their mortgage loans and selling their properties to third parties. The Government has deprived and will deprive these plaintiffs of earnings on the sales of their properties because its repudiation of plaintiffs' contractual termination right has prevented any prepayment, and consequently any sale, from taking place.

50. But for the Government's conduct, certain plaintiffs would have terminated their contracts by prepaying their mortgage loans and converting their properties into commercial housing in which they could obtain rents at market rates in excess of the rents chargeable to low- and moderate-income tenants under the Government's programs. The Government has deprived and will deprive these plaintiffs of the value of increased rents they would receive because its repudiation of plaintiffs' contractual termination

right has prevented any prepayment, and consequently any increase in rents, from taking place.

51. All plaintiffs have suffered other, additional damages including without limitation the lost opportunity costs associated with investment and business opportunities plaintiffs have been foreclosed from pursuing by virtue of their inability to exercise their contractual right to terminate their contracts at any time at their option.

COUNT ONE

(Breach of Contract)

52. Plaintiffs incorporate paragraphs 1 through 51 by reference as if fully set forth herein.

53. Defendant's 1992 legislation anticipatorily repudiated the contract between the defendant and each of the plaintiffs. The Government's anticipatory repudiation has deprived and will deprive each plaintiff of its contractual right to terminate its contract at any time at its option before the expiration date of its forty (40) or fifty (50) year contract term. The Government's anticipatory repudiation constitutes a breach of each plaintiff's contract as of the date of Government performance required by each contract, i.e., the date that each plaintiff would terminate its contract but for the Government's repudiation.

54. As a direct and proximate result of defendant's conduct, plaintiffs have been damaged in an amount which will be proven at trial. Plaintiffs are continuing to suffer injury and resulting damages each day that they are denied the ability to exercise their contractual termination right and go to market with their properties at any time at their option.

COUNT TWO

(Just Compensation)

55. Plaintiffs incorporate paragraphs 1 through 54 by reference as if fully set forth herein.

56. As of the date of Government performance required by each contract entered into between defendant and the plaintiffs, defendant's conduct constitutes a taking of plaintiffs' properties for public use and requires payment to plaintiffs of just compensation under the Fifth Amendment to the U.S. Constitution.

57. Plaintiffs are entitled to just compensation for the taking of their properties in an amount which will be proven at trial. Plaintiffs are continuing to suffer injury and resulting damages each day that they are denied the ability to exercise their contractual termination right and go to market with their properties at any time at their option.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment as follows:

AS TO COUNT ONE

1. That the Court award plaintiffs monetary relief for the damages suffered to date and for the damages plaintiffs continue to suffer as a result of defendant's breaches of plaintiffs' contracts, in an amount to be determined at trial.

AS TO COUNT TWO

2. That the Court award plaintiffs just compensation during the period during which plaintiffs' properties have been taken for public use by defendant, in an amount to be determined at trial.

AS TO ALL COUNTS

3. That the Court certify this as a class action.

4. That the Court award plaintiffs their attorneys' fees and expenses as allowed pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 et seq., the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4654(c), and other applicable law.

5. That the Court award plaintiffs their costs and interest as allowed by law.

6. That the Court grant such other and further relief as the law and the evidence may justify and as the Court may deem just and proper.

Respectfully submitted,

Dated: September 15, 1998

By: /s/
Jeff H. Eckland
Attorney for Plaintiffs

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FRANCONIA ASSOCIATES, a Limited Partnership, et al.,	)	File No. 97-381C (Judge Gibson)
Plaintiffs,	)	
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

DECLARATION OF P.J. PERRI

I, P.J. PERRI, declare as follows:

1. I am plaintiff no. 12 in the above-described action.

2. I entered into a contract with the Farmers Home Administration on May 31, 1978 for a 24-unit apartment project, called Palmyra Park Apartments I, located in Palmyra, Wisconsin.

3. I decided to prepay my mortgage loan on this project without restrictive-use provisions in 1993. I have attached a true and correct copy of my prepayment request, dated November 10, 1993, as Exhibit I.

4. Pursuant to various regulations and FmHA requirements, I submitted to FmHA various financial information as part of my prepayment application. (See Exhibit II.)

5. As indicated in my letter dated March 14, 1994 to FmHA (a true and correct copy of which has been attached hereto as Exhibit III), my prepayment application was complete as of March 1994.

6. FmHA rejected my offer to prepay the mortgage on Palmyra Park Apartments I.

7. As a consequence of being unable to exercise my contractual right to prepay Palmyra Park Apartments I, I

have been compelled to continue owning and managing Palmyra Park Apartments I.

8. I both own and manage Palmyra Park Apartments I, which constitutes an incredible imposition on my time and health.

9. I planned, upon prepayment, to sell Palmyra Park Apartments I to a buyer who would charge commercial market rate rents. It was my intention to leave the business of owning and managing apartment complexes.

10. My intent upon prepayment was to invest the proceeds from the sale of Palmyra Park Apartments I in part to fund my retirement.

11. Instead, I have been forced to continue managing an apartment complex under very stressful conditions, working every weekend. There is no end in sight to my responsibilities.

12. I suffered no damages of any kind, prior to 1993, because it was not until that date that I decided to prepay.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 18, 1999 in Madison, Wisconsin.

/s/
P.J. Perri

M2:20243688 01

P.J. PERRI
23 Hickory Hollow
Madison, Wisconsin 53705
608-233-7544

November 10, 1993

Farmers Home Administration
7878 Big Sky Drive
Madison, Wisconsin 53719

RE: PREPAYMENT

Dear Sirs:

In accordance with FmHA Instructions 1965-E and Exhibit C I am requesting approval to pre-pay the following projects.

Palmyra Park Apartments I
322 South Second Street
Palmyra, Wisconsin 53156

It is my intention to complete the process of paying the loan pre-payment no sooner than 180 days from the date of this request.

If I am to pre-pay the loan in less than 180 days I agree to extend all leases and guarantee existing rent and living conditions for at least 180 days or until all current leases expire, whichever is later.

I also agree to continue to administer the housing in accordance with the fair housing policies after pre-payment. (See attached Exhibit B.)

It is also my intention to pre-pay without restrictive-use provision in the release documents.

For tenants entering the project after the date of this prepayment application, the following language will be inserted in an addendum to the lease. See attached Exhibit A-is attached.

All new tenants will receive copies of all letters sent to all existing tenants advising them of the status of the prepayment request.

All additional information and documentation required by FmHA Instructions 1965-E, Exhibit B are attached for your review and acknowledgment.

Sincerely,
/s/
P. J. PERRI

EXHIBIT -A

"The mortgage on this project may be prepaid to the Federal Government on or after _____ . Your rent may be raised to $_____ and/or you may be asked to move from this project."

P.J. PERRI
23 Hickory Hollow
Madison, Wisconsin 53705
608-233-7544

November 10, 1993

Farmers Home Administration
7878 Big Sky Drive
Madison, Wisconsin 53719

RE: FAIR HOUSING CERTIFICATION (Exhibit B)

Dear Sirs:

In accordance with 1965-E, Exhibit C (A), I certify the following:

> I, P. J. PERRI AND MY SUCCESSORS IN INTEREST, WILL CONTINUE TO ADMINISTER THE HOUSING: PALMYRA PARK APARTMENTS I & II IN ACCORDANCE WITH FAIR HOUSING POLICIES AFTER PRE-PAYMENT.

/s/_____
P. J. PERRI, OWNER

P.J. PERRI
23 Hickory Hollow
Madison, Wisconsin 53705
608-233-7544

December 1, 1993

Ray Ellenberger
Farmers Home Administration
7878 Big Sky Drive
Madison, Wisconsin 53719

Dear Sirs:

Attached are applications for pre-payment of the following project owned by me:

> Palmyra Park Apartments I
> 322 S. Second Street
> Palmyra, Wisconsin 53156

I believe the applications have been completed in accordance with 1965E and Exhibits. If the applications are complete, please acknowledge. If not, please inform me of any additional material needed.

Any correspondence concerning these applications should be addressed to my agent as follows:

> John H. Ringstad
> Key Consultants
> 36 Grand Avenue
> Neillsville, WI.
> 54456

Sincerely,

P. J. PERRI

Enclosures

P.J. PERRI
23 Hickory Hollow
Madison, Wisconsin 53705
608-233-7544

March 14, 1994

Mike Daniels
Farmers Home Administration
7878 Big Sky Drive
Madison, Wisconsin 53719

RE: PALMYRA PARK I & II
APPLICATION

Dear Mike,

Enclosed please find the Addendum to the Commitment Letter for the above mentioned projects.

With the receipt of this information, I assume that your review is satisfactory and the application will be processed.

Since four months have passed since this application was given to FmHA I hope the waiting time is over.

I want to thank you for coming to Palmyra to speak with my tenants. They all seemed to understand this time. Thank you for your time and considerations.

Sincerely,

PALMYRA PARK APARTMENTS I & II

P. J. PERRI
Owner

LOAN AGREEMENT
(RRH LOAN TO A LIMITED PARTNERSHIP
OPERATING ON A LIMITED PROFIT BASIS)

1. Parties and Terms Defined. This agreement dated January 24, 1979 of the Pine Needle Apartments, a Partnership, duly organized and operating under Chapter 59, Article 1 of North Carolina General Statutes, (Authorizing State statute) herein called "Partnership," whose post office address is Fletcher, North Carolina, with the United States of America acting through the Farmers Home Administration, United States Department of Agriculture, herein called "the Government," is made in consideration of a loan, herein called "the loan," to Partnership in the amount of $ 1,238,170.00 made or insured, or to be made or insured, by the Government pursuant to sections 515 (b) and 521 (a) of the Housing Act of 1949. The loan may be insured by the Government for the benefit of the lender. The loan shall be used solely for the specific eligible purposes for which it is approved by the Government in order to provide rental housing and related facilities for eligible occupants, as defined by the Government in rural areas. Such housing and facilities and the land constituting the site as herein called "the housing." The indebtedness and other obligations of the Partnership under the note evidencing the loan, the related security instrument and related agreement are herein called the "loan obligations."

2. Execution of Loan Instruments. To evidence the loan, the Partnership shall issue a promissory note signed by general partner for the amount of the loan, payable in installments over a period of fifty years, bearing interest at a rate, and containing other terms and conditions,

prescribed by the Government. To secure the note or any indemnity or other agreement by the Government, the general partner(s) are to execute a real estate security instrument giving a lien upon the housing and upon such other real property of the Partnership as the Government shall require, including an assignment of the rents and profits as collateral security to be enforced in the event of any default by the Partnership, and containing other terms and conditions prescribed by the Government. The general partner(s) are to execute any other security instruments and other instruments and documents required by the Government in connection with the making or insuring of the loan.

3. Equal Opportunity and Nondiscrimination Provisions. The Partnership will execute (a) any undertakings and agreements required by the Government pursuant to Executive Order 11063 regarding non-discrimination in the use and occupancy of housing, (b) Farmers Home Administration Form FmHA 400-1 entitled "Equal Opportunity Agreement," including an "Equal Opportunity Clause" to be incorporated in or attached as a rider to each construction contract the amount of which exceeds $10,000 and any part of which is paid for with funds from the loan, and (c) Farmers Home Administration Form FmHA 400-4, entitled "Nondiscrimination Agreement (Under Title VI, Civil Rights Act of 1964)," a copy of which is attached hereto and made a part thereof and any other undertakings and agreements required by the Government pursuant to lawful authority.

4. Supervised Bank Account. The proceeds of the Government loan and the amount of $ 65,170.00 to be contributed by the Partnership from its own funds and used for eligible loan purposes shall be deposited in a supervised bank account as required by the Government.1/ Amounts of the Government loan in the supervised bank account exceeding $40,000 shall be secured by the depository bank in

advance in accordance with U.S. Treasury Department Circular No. 176. As provided by the terms of the agreement creating the supervised bank account, all funds therein shall, until duly expended, collaterally secure the loan obligations. Withdrawals (or advances) from the supervised bank account by (or for) the Partnership shall be made only on checks (or statements and partial payment estimates) signed by a general partner and countersigned by the County Supervisor of the Farmers Home Administration, and only for the specific loan purposes approved in writing by the Government. The Partnership's share of any liquidated damages or other monies paid by defaulting contractors or their sureties shall be deposited in the supervised bank account to assure completion of the project. When all approved items eligible for payment with the Government loan funds are paid in full, any balance remaining in the supervised bank account shall be applied on the note as an "extra payment" as defined in the regulations of the Farmers Home Administration, and the supervised bank account shall be closed.

5. Accounts for Housing Operations and Loan Servicing. The Partnership shall establish on its books the following accounts, which shall be maintained so long as the loan obligations remain unsatisfied: A General Fund Account, an Operation and Maintenance Account, a Debt Service Account, and a Reserve Account. Funds in said accounts shall be deposited in a bank or banks insured by the Federal Deposit Insurance Corporation, except for any portion invested in readily marketable obligations of the United States as authorized by section 9. The general partner(s) shall execute a fidelity bond with a surety company approved by the Government, in an amount not less than the estimated maximum amount of such funds to be held in said accounts at any one time. The United States of America shall be named as co-obligee, and the amount of the bond shall not be reduced without the prior written consent

of the government. The Partnership in its discretion may at any time establish and utilize additional accounts to handle any funds not covered by the provisions of this agreement.

6. General fund Account. By the time the Government loan is closed or interim funds are obtained to preclude the necessity for multiple advances of loan funds whichever occurs first, the Partnership shall from its own funds deposit in the General Fund Account the amount of $ 26,067.00 . All income and revenue from the housing shall, upon receipt, be immediately deposited in the General Fund Account. The Partnership may also in its discretion at any time deposit therein other funds, not otherwise provided for by this agreement, to be used for any of the purposes authorized in sections 7, 8, or 9. Funds in the General Fund Account shall be used only as authorized in said sections and until so used shall be held by the Partnership in trust for the Government as security for the loan obligations.

7. Operation and Maintenance Account. Not later than the 15th of each month, out of the General Fund Account shall be transferred to the Operation and Maintenance Account sufficient amounts to enable the Partnership to pay from the Operation and Maintenance Account the actual, reasonable, and necessary current expenses, for the current month and the ensuing month, of operating and maintaining the housing not otherwise provided for. Current expenses may include, in addition to expenses occurring or becoming due monthly, monthly accumulations of proportionate amounts for the payments of items which may become due either annually or at irregular intervals, such as taxes, insurance and normal repair and replacement of furnishings and equipment reasonably necessary for operation of the housing. Current expenses may also include initial purchase and installation of such furnishings and equipment with any funds deposited in the transferred from the General Fund account which are not proceeds of the loan or income or revenue from the housing.

8. Debt Service Account. Each month, immediately after the transfer to the Operation and Maintenance Account provided for in section 7, or after it is determined that no such transfer is called for, any balance remaining in the General Fund Account, or so much thereof as may be necessary, shall be transferred to the Debt Service Account until the amount in the Debt Service Account equals the amount of the next installment due on the loan: Funds in the Debt Service Account shall be used only for payments on the loan obligations and until so used, shall be held by the Partnership in trust for the Government as security therefor.

9. Reserve Account. (a) Immediately after each transfer to the Debt Service Account as provided in section 8, any balance in the General Fund Account shall be transferred to the Reserve Account. Funds in the Reserve Account may be used only as authorized in this agreement and until so used shall be held by the Partnership in trust as security for the loan obligations. Transfers at a rate not less than $ 11,215.00 2/ annually shall be made to the Reserve Account until the amount in the Reserve Account reaches the sum of $ 112,150.00 3/ and shall be resumed at any time when necessary, because of disbursements from the Reserve Account to restore it to said sum. Of such sum, at least 50 percent shall be maintained on a cash basis, referred to herein as the "cash reserve." After the cash reserve reaches the required 50 percent of said sum, all or any portion of the balance of said sum may, at the option of the Partnership, consist of an amount, referred to herein as the "prepayment reserve," by which the Partnership is "ahead of schedule" as defined in the regulations of the Farmers Home Administration. Funds in the cash reserve shall be deposited in a separate bank account or accounts insured by the Federal Deposition Insurance Corporation or invested in readily marketable obligations of the United States, the earnings on which shall accrue to the Reserve Account.

(b) With the prior consent of the Government, funds in the Reserve Account may be used by the Partnership--

(1) To meet payments due on the loan obligations in the event the amount in the Debt Service Account is not sufficient for the purpose.

(2) To pay costs of repairs or replacements to the housing caused by catastrophe or long-range depreciation which are not current expenses under section 7.

(3) To make improvements or extensions to the housing.

(4) For other purposes desired by the Partnership which in the judgment of the Government likely will promote the loan purposes without jeopardizing collectibility of the loan, or impairing the adequacy of the security, or will strengthen the security, or will facilitate, improve, or maintain the orderly collectibility of the loan.

(5) To pay dividends to the partners of up to 8% per annum of the borrowers initial investment of $ 91,237.00 4/ provided the Partnership determines that after such disbursement (a) the amount in the Reserve Account will be not less than that required by subsection 9 (a) to be accumulated by that time and (b) during the next 12 months the amount in the reserve Account will be likely not fall below that required to be accumulated by the end of such period.

(c) Any amount in the Reserve Account which exceeds the aggregate sum specified in subsection 9 (a) and is not agreed between the Partnership and the Government to be used for purposes authorized in subsection 9 (b) shall be applied promptly on the loan obligations.

10. Regulatory Covenants. So long as the loan obligations remain unsatisfied, the Partnership shall--

(a) Impose and collect such fees, assessments, rents, and charges that the income of the housing will be sufficient at all times for operation and maintenance of the housing,

payments on the loan obligations, and maintenance of the accounts herein provided for.

(b) If return on investment for any year exceeds 8 percent per annum of borrower's initial investment of $ 91,237.00 4/, the Government may require that the borrower reduce rents the following year and/or refund the excess return on investment to the tenants or use said excess in a manner that will best benefit the tenants.

(c) Maintain complete books and records relating to the housing's financial affairs, cause such books and records to be audited at the end of each fiscal year, promptly furnished the Government without request a copy of each audit report, and permit the Government to inspect such books and records at all reasonable times.

(d) If required or permitted by the Government, revise the accounts herein provided for, or established new accounts to cover the handling and disposition of income from and payment of expenses attributable to the housing or to any other property securing the loan obligations, and submit regular and special reports concerning the housing or financial affairs.

(e) Agree that if any provisions of its organization documents or any verbal understandings in any conflict with the terms of this loan agreement, the terms of the loan agreement shall prevail and govern.

(f) Unless the Government gives prior consent--

(1) Not use the housing for any purpose other than as rental housing and related facilities for eligible occupants.

(2) Not enter into any contract or agreement for improvements or extensions to the housing or other property securing the loan obligations.

(3) Not change the membership by either the admission or withdrawal of the general partner(s) nor permit the general partner(s) to maintain less than a 5 percent financial interest in the organization nor cause or permit voluntary dissolution of the Partnership nor cause or permit any

transfer or encumbrance of title to the housing or any part thereof or interest therein, by sale, mortgage, lease, or otherwise.

(4) Not borrow any money, nor incur any liability aside from current expenses as defined in section 7 which would have a detrimental effect on the housing.

(g) Submit for the housing the following to the Government for prior review not less than 30 days before the effective dates, and for prior approval by the Government.

(1) Annual budgets and operating plans.

(2) Statements of management policy and practice, including eligibility criteria and implementing rules for occupancy of the housing.

(3) Proposed rents and charges and other terms of rental agreements with occupants and compensation to employees of the housing project.

(4) Rates of compensation to officers and employees of the Partnership payable from the chargeable to any account provided for in this agreement.

(h) If required by the Government, modify and adjust any matters covered by clause (g) of this section.

(i) Comply with all its agreements and obligations in or under the note, security instrument, and any related agreement executed by the Partnership in connection with the loan.

(j) Not alter, amend, or repeal without the Government's consent this agreement or the Partnership agreement, which shall constitute parts of the total contract between the Partnership and the Government relating to the loan obligation.

(k) Do other things as may be required by the Government in connection with the operation of the housing, or with any of the Partnership's operations or affairs which may affect the housing, the loan obligation, or the security.

(11) Refinancing the loan. If at any time it appears to the Government that the Partnership is able to obtain a loan upon reasonable terms and conditions to refinance the loan obligations then outstanding, upon request from the Government the Partnership will apply for, take all necessary actions to obtain, and accept such refinancing loan and will use the proceeds for said purpose.

(12) General Provisions. (a) It is understood and agreed by the Partnership that any loan made or insured will be administered subject to the limitations of the authorizing act of Congress and related regulations, and that any rights granted to the Government herein or elsewhere may be exercised by it in its sole discretion to carry out the purposes of the loan, enforce such limitations, and protect the Government's financial interest in the loan and the security.

(b) The provisions of this agreement are representations to the Government to induce the Government to make or insure a loan to the Partnership as aforesaid. If the Partnership should fail to comply with or perform any provision of the agreement or any requirement made by the Government pursuant to this agreement, such failure shall constitute default as fully as default in payment of amounts due on the loan obligations. In the event of such failure, the Government at its option may declare the entire amount of the loan obligations immediately due and payable and, if such entire amount is not paid forthwith, may take possession of and operate the housing and proceed to foreclose its security and enforce all other available remedies.

(c) Any provisions of this agreement may be waived by the Government in its sole discretion, or changed by agreement between the Government and the Partnership, after this agreement becomes contractually binding, to any extent such provisions could legally have been foregone or agreed to in amended form, by the Government initially.

(d) Any notice, consent, approval, waiver, or agreement must be in writing.

(e) This agreement may be cited in the security instrument and any other instruments as the "Loan Agreement of January 24, 1979." (date of this agreement)

Pine Needle Apartments
PARTNERSHIP NAME

BY:

_____ By: s/
_____ George W. Morosani, General Partner
_____ _____

1/ Only loan funds and borrower's funds to be used for an eligible loan purpose may be deposited in the supervised bank account.

2/ In most case figures should be one-tenth of the aggregate sum specified later in the sentence and indicated by footnote 3.

3/ The amount to be inserted will usually be about 10 percent of the value of the buildings and related facilities financed wholly or partially with the loan.

4/ The amount to be inserted shall be determined in accordance with paragraph VIII K of FmHA Instruction 444.5.

o0o

F-183318
V-2

USDA-FHA
Form FHA 427-1 WA
(Rev. 7-1-73)

REAL ESTATE MORTGAGE FOR WASHINGTON

7601060048

KNOW ALL MEN BY THESE PRESENTS, Dated December 31, 1975

WHEREAS, the undersigned WISHING WELL ASSOCIATES, a Partnership,

located in Snohomish County, Washington whose post office address is 6024 83rd N.E., Marysville, Washington 98270, herein called "Borrower," are (is) justly indebted to the United States of America, acting through the Farmers Home Administration, United States Department of Agriculture, herein called the "Government," as evidenced by one or more certain promissory note(s) or assumption agreement(s), herein called "note" (if more than one note is described below, the word "note" as used herein shall be construed as referring to each note singly or all notes collectively, as the context may require), said note being executed by Borrower, being payable to the order of the Government in installments as specified therein, authorizing acceleration of the entire indebtedness at the option of the Government upon any default by Borrower, and being further described as follows:

Date of Instrument	Principal Amount	Annual Rate of Interest	Due Date of Final Installment
12-31-1975	$536,700.00	8 1/8%	12-31-2025

And the note evidences a loan to Borrower, and the Government, at any time, may assign the note and insure the payment thereof pursuant to the Consolidated Farm and Rural Development Act, or Title V of the Housing Act of 1949;

And it is the purpose and intent of this instrument that, among other things, at all times when the note is held by the Government, or in the event the Government should assign this instrument without insurance of the note, this instrument shall secure payment of the note; but when the note is held by an insured holder, this instrument shall not secure payment of the note or attach to the debt evidenced thereby, but as to the note and such debt shall constitute an indemnity mortgage to secure the Government against loss under its insurance contract by reason of any default by Borrower;

NOW, THEREFORE, in consideration of the loan(s) and (a) at all times when the note is held by the Government or in the event the Government should assign this instrument without insurance of the payment of the note, to secure prompt payment of the note and any renewals and extensions thereof and any agreements contained therein, including any provision for the payment of an insurance or other charge, (b) at all times when the note is held by an insured holder, to secure performance of Borrower's agreement herein to indemnify and save harmless the Government against loss under its insurance contract by reason of any default by Borrower, and (c) in any event and at all times to secure the prompt payment of all advances and expenditures made by the Government, with interest, as hereinafter described, and the performance of every covenant and agreement of Borrower contained herein or in any supplementary agreement, Borrower does hereby grant, bargain, sell, convey, mortgage, and assign with general warranty unto the Government the following property situated in the State of Washington, County(ies) of Snohomish:

VOL. # PAGE
REQ OF
FIRST AMERICAN TITLE INSURANCE CO.
AM JAN 6 1976
HENRY B. WHALEN AUDITOR
SNOHOMISH COUNTY, WASH.
DEPUTY

OFFICIAL RECORDS

APP.64

7601060048

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FOLLOWS:
BEGINNING AT THE NORTH T CORNER OF SAID SOUTHE QUARTER OF THE NORTHWEST QUARTER; THENCE SOUTH 1°13'00" WEST FOR 375.0 FEET; THENCE EAST PARALLEL WITH THE NORTH LINE OF SAID SOUTHWEST QUARTER OF THE NORTHEAST QUARTER FOR 344.73 FEET MORE OR LESS TO THE WEST LINE OF THE PLAT OF ALOHA, ACCORDING TO PLAT THEREOF RECORDED IN SNOHOMISH COUNTY, WASHINGTON; THENCE NORTH ALONG SAID WEST LINE FOR 375.0 FEET TO THE NORTH LINE OF SAID SOUTHWEST QUARTER OF THE NORTHEAST QUARTER; THENCE WEST ALONG SAID NORTH LINE FOR 330 FEET MORE OR LESS, TO THE TRUE POINT OF BEGINNING;
LESS THE NORTH 30.0 FEET FOR COUNTY ROAD.
TOGETHER WITH AN EASEMENT FOR INGRESS AND EGRESS OVER THE FOLLOWING DESCRIBED TRACT:
BEGINNING AT THE NORTHEAST CORNER OF THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 21, TOWNSHIP 30 NORTH, RANGE 5 EAST, W.M.; THENCE SOUTH 1°13'00" WEST ALONG WEST LINE OF ABOVE SAID PARCEL FOR 375.0 FEET; THENCE SOUTH 89°57'30" WEST FOR 40.0 FEET; THENCE NORTH 1°13'00" EAST FOR 375.0 FEET; THENCE NORTH 89°57'30" EAST FOR 40.0 FEET TO THE TRUE POINT OF BEGINNING, EXCEPT THE NORTH 30.00 FEET FOR COUNTY ROAD (88TH ST. N.E.).
SITUATE IN THE COUNTY OF SNOHOMISH, STATE OF WASHINGTON.

SUBJECT TO: Easements and rights of way of record.

Borrower covenants and agrees that it will not discriminate, or permit discrimination by any agent, lessee, or other operator, in the use or occupancy of the housing or related facilities financed in whole or in part with the loan in connection with which this instrument is given, because of race, color, creed, or national origin.

This instrument also secures the obligations and covenants of Borrower set forth in Borrower's Loan Agreement of December 31, 1975, which is hereby incorporated herein by reference.

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together with all rights, interests, easements, hereditaments and appurtenances thereunto belonging, the rents, issues, and profits thereof and revenues and income therefrom, all improvements and personal property now or later attached thereto or reasonably necessary to the use thereof, including, but not limited to, ranges, refrigerators, clothes washers, clothes dryers, or carpeting purchased or financed in whole or in part with loan funds, all water, water rights, and water stock pertaining thereto, and all payments at any time owing to Borrower by virtue of any sale, lease, transfer, conveyance, or condemnation of any part thereof or interest therein-all of which are herein called "the property";

TO HAVE AND TO HOLD the property unto the Government and its assigns forever in fee simple.

BORROWER for himself, his heirs, executors, administrators, successors and assigns WARRANTS THE TITLE to the property to the Government against all lawful claims and demands whatsoever except any liens, encumbrances, easements, reservations, or conveyances specified hereinabove, and COVENANTS AND AGREES as follows:

(1) To pay promptly when due any indebtedness to the Government hereby secured and to indemnify and save harmless the Government against any loss under its insurance of payment of the note by reason of any default by Borrower. At all times when the note is held by an insured holder, Borrower shall continue to make payments on the note to the Government, as collection agent for the holder.

(2) To pay to the Government such fees and other charges as may now or hereafter be required by regulations of the Farmers Home Administration.

(3) If required by the Government, to make additional monthly payments of 1/12 of the estimated annual taxes, assessments, insurance premiums and other charges upon the mortgaged premises.

(4) Whether or not the note is insured by the Government, the Government may at any time pay any other amounts required herein to be paid by Borrower and not paid by him when due, as well as any costs and expenses for the preservation, protection, or enforcement of this lien, as advances for the account of Borrower. All such advances shall bear interest at the rate borne by the note which has the highest interest rate.

(5) All advances by the Government as described by this instrument, with interest, shall be immediately due and payable by Borrower to the Government without demand at the place designated in the latest note and shall be secured hereby. No such advance by the Government shall relieve Borrower from breach of his covenant to pay. Any payment made by Borrower may be applied on the note or any indebtedness to the Government secured hereby, in any order the Government determines.

(6) To use the loan evidenced by the note solely for purposes authorized by the Government.

APP.65

7601060048

(7) To pay when due all taxes, judgments, encumbrances, and assessments lawfully attaching to or assessed against the property, including all charges and assessments in connection with water, water rights, and water stock pertaining to or reasonably necessary to the use of the real property described above, and promptly deliver to the Government without demand receipts evidencing such payments;

(8) To keep the property insured as required by and under insurance policies approved by, delivered to, and retained by the Government;

(9) To maintain improvements in good repair and make repairs required by the Government; operate the property in a good and husbandmanlike manner; comply with such farm conservation practices and farm and home management plans as the Government from time to time may prescribe; and not to abandon the property, or cause or permit waste, loosening or impairment of the security covered hereby, or, without the written consent of the Government, cut, remove, or lease any timber, gravel, oil, gas, coal, or other minerals except as may be necessary for ordinary domestic purposes.

(10) To comply with all laws, ordinances, and regulations affecting the property.

(11) To pay or reimburse the Government for expenses reasonably necessary or incidental to the protection of the lien and priority hereof and to the enforcement of or the compliance with the provisions hereof and of the note and any supplementary agreement (whether before or after default), including but not limited to costs of evidence of title to and survey of the property, costs of recording this and other instruments, attorneys' fees, trustees' fees, court costs, and expenses of advertising, selling, and conveying the property.

(12) Neither the property nor any portion thereof or interest therein shall be leased, assigned, sold, transferred or encumbered, voluntarily or otherwise, without the written consent of the Government. The Government shall have the sole and exclusive rights as mortgagee hereunder, including but not limited to the power to grant consents, partial releases, subordinations, and satisfaction, and no leased holder shall have any right, title or interest in or to the lien or any benefits hereof.

(13) At all reasonable times the Government and its agents may inspect the property to ascertain whether the covenants and agreements contained herein or in any supplementary agreement are being performed.

(14) The Government may extend and defer the maturity of and renew and reamortize the debt evidenced by the note or any indebtedness to the Government secured hereby, release from liability to the Government any party so liable thereon, release portions of the property from and subordinate the lien hereof, and waive any other rights hereunder, without affecting the lien or priority hereof or the liability to the Government of Borrower or any other party for payment of the note or indebtedness secured hereby except as specified by the Government in writing.

(15) If at any time it shall appear to the Government that Borrower may be able to obtain a loan from a production credit association, a Federal land bank, or other responsible cooperative or private credit source, at reasonable rates and terms for loans for similar purposes and periods of time, Borrower will, upon the Government's request, apply for and accept such loan in sufficient amount to pay the note and any indebtedness secured hereby and to pay for any stock necessary to be purchased in a cooperative lending agency in connection with such loan.

(16) Default hereunder shall constitute default under any other real estate, or under any personal property or other security instrument held or insured by the Government and executed or assumed by Borrower, and default under any such other security instrument shall constitute default hereunder.

(17) SHOULD DEFAULT occur in the performance or discharge of any obligation secured by this instrument, or should any one of the parties named as Borrower die or be declared an incompetent, a bankrupt, or an insolvent, or make an assignment for the benefit of creditors, the Government, at its option, with or without notice, may: (a) declare the entire amount unpaid under the note and any indebtedness to the Government hereby secured immediately due and payable, (b) for the account of Borrower incur and pay reasonable expenses for repair or maintenance of and take possession of, operate or rent the property, (c) upon application by it and production of this instrument, without other evidence and without notice of hearing of said application, have a receiver appointed for the property, with the usual powers of receivers in like cases, (d) foreclose this instrument as provided herein or by law, and (e) enforce any and all other rights and remedies provided herein or by present or future law.

(18) The proceeds of foreclosure sale shall be applied in the following order to the payment of: (a) costs and expenses incident to enforcing or complying with the provisions hereof, (b) any prior liens required by law or a competent court to be so paid, (c) the debt evidenced by the note and all indebtedness to the Government secured hereby, (d) inferior liens of record required by law or a competent court to be so paid, (e) at the Government's option, any other indebtedness of Borrower owing to or insured by the Government, and (f) any balance to Borrower. At foreclosure or other sale of all or any part of the property, the Government and its agents may bid and purchase as a stranger and may pay the Government's share of the purchase price by crediting such amount on any debts of Borrower owing to or insured by the Government, in the order prescribed above.

(19) As against the debt evidenced by the note and any indebtedness to the Government hereby secured, with respect to the property, Borrower (a) hereby relinquishes, waives, and conveys all rights, inchoate or consummate, of descent, dower, curtesy, homestead, valuation, appraisal, and exemption, to which Borrower is or becomes entitled under the laws and constitution of the jurisdiction where the property lies, and (b) hereby agrees that any right provided by such laws or constitution for redemption or possession following foreclosure sale shall not apply, and that no right of redemption or possession shall exist after foreclosure sale.

(20) If any part of the loan for which this instrument is given shall be used to finance the purchase, construction or repair of property to be used as an owner-occupied dwelling (herein called "the dwelling") and if Borrower intends to sell or rent the dwelling and has obtained the Government's consent to do so (a) neither Borrower nor anyone authorized to act for him will, after receipt of a bona fide offer, refuse to negotiate for the sale or rental of the dwelling or will otherwise make unavailable or deny the dwelling to anyone because of race, color, religion or national origin, and (b) Borrower recognizes as illegal and hereby disclaims, and will not comply with or attempt to enforce any restrictive covenants on the dwelling relating to race, color, religion, or national origin.

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(21) This instrument shall be subject to the present regulations of the Farmers Home Administration, and to the future regulations not inconsistent with the express provisions hereof.

(22) Notices given hereunder shall be sent by certified mail unless otherwise required by law, addressed, unless and until some other address is designated in a notice so given, in the case of the Government to Farmers Home Administration, United States Department of Agriculture, at Wenatchee, Washington 98801, and in the case of Borrower to him at his post office address stated above.

(23) If any provision of this instrument or application thereof to any person or circumstances is held invalid, such invalidity will not affect other provisions or applications of the instrument which can be given effect without the invalid provision or application, and to that end the provisions hereof are declared to be severable.

WITNESS the hand(s) of Borrower the day and year first above written.

WISHING WELL ASSOCIATES, A Partnership

By James H. Mulligan
James H. Mulligan, Partner

By JoAnn O. Mulligan
JoAnn O. Mulligan

By Tom Vasilatos for Omega Alpha, Inc.
Tom Vasilatos, Partner

By Charlotte E. Vasilatos for Omega Alpha, Inc.
Charlotte E. Vasilatos

By Neil Harmon
Neil Harmon, Partner

By Gini Harmon
Gini Harmon

GH

ACKNOWLEDGMENT

STATE OF WASHINGTON)
) ss:
COUNTY OF SNOHOMISH)

On this 31st day of December, 19 75, before me, the undersigned, a Notary Public in and for said State, personally appeared James H. Mulligan, JoAnn O. Mulligan, Tom Vasilatos, Charlotte E. Vasilatos, Neil Harmon, and Gini Harmon, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same as their free act and deed for the uses, purposes, and consideration therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the said date.

Sandra J. Tarwid
Notary Public in and for the

NOTARY PUBLIC

OFFICIAL RECORDS VOL 932 PAGE 60

Supreme Court, U.S.
FILED
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No. 01-455

In the Supreme Court of the United States

GRASS VALLEY TERRACE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, for purposes of the six-year statute of limitations under 28 U.S.C. 2501 for actions in the Court of Federal Claims, a breach of contract action based upon the effect of the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, Tit. II, 101 Stat. 1877, first accrued when that statute was enacted.

2. Whether, for purposes of the six-year statute of limitations under 28 U.S.C. 2501 for actions in the Court of Federal Claims, a Fifth Amendment taking action based upon the effect of the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, Tit. II, 101 Stat. 1877, first accrued when that statute was enacted.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in *Franconia Associates* v. *United States* is reported at 240 F.3d 1358. The opinions of the Court of Federal Claims in *Franconia Associates* are reported at 43 Fed. Cl. 702 and 44 Fed. Cl. 315. No opinion was issued by the court of appeals in *Grass Valley Terrace* v. *United States*. The opinion of the Court of Federal Claims in *Grass Valley Terrace* v. *United States* is reported at 46 Fed. Cl. 629 (2000).

JURISDICTION

The judgment of the court of appeals in *Franconia Associates* was entered on February 15, 2001. A petition for rehearing was denied on June 19, 2001. The judgment of the court of appeals in *Grass Valley*

Terrace was entered on May 17, 2001. On July 31, 2001, the Chief Justice extended the time for filing a petition for a writ of certiorari in *Grass Valley Terrace* to and including September 14, 2001. The petition for a writ of certiorari was filed on September 10, 2001. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Sections 515 and 521 of the Housing Act of 1949, 42 U.S.C. 1485, 1490a (1994 & Supp. V 1999), the Farmers Home Administration (FmHA) made direct loans to private, non-profit entities to develop and/or construct rural housing designed to serve the elderly and low- or middle-income individuals and families. Each petitioner entered into a loan agreement with the FmHA under Sections 515 and 521, "in order to provide rental housing and related facilities for eligible occupants * * * in rural areas." Pet. App. A165. The loan agreements contained various provisions designed to ensure that the projects would be affordable for low-income tenants. Those provisions included restrictions as to the tenants to whom the petitioners could rent, the rents petitioners could charge, and the rate of return petitioners could realize, as well as requirements regarding the maintenance and financial operations of each project. *Id.* at A165-A174. Petitioners all entered into their loan agreements before December 21, 1979. *Id.* at A3.

In connection with the loan agreements, each petitioner also executed a promissory note and a security instrument, ordinarily a mortgage. Those loan documents specified that petitioners must pay the principal on the mortgage in scheduled installments, plus interest. Pet. App. A176-A177. According to petitioners, those documents also provided petitioners with the

option of prepaying their mortgages and thereby discontinuing the low-income affordability restrictions, at any time. *Id.* at A112, A176. The note term upon which petitioners rely stated: "[p]repayments of scheduled installments, or any portion thereof, may be made at any time at the option of the Borrower." *Id.* at A176.

2. By 1979, many Section 515 participants had started to prepay their mortgages, thus threatening the continued availability of rural low- and moderate-income housing. Finding that it had been "the clear intent of Congress that these projects be available to low and moderate income families for the entire original term of the loan," Congress amended the National Housing Act to preclude the loss of low-cost rural housing due to prepayments. H.R. Rep. No. 154, 96th Cong., 1st Sess. 43 (1979). In the Housing and Community Development Amendments of 1979, Pub. L. No. 96-153, 93 Stat. 1101, Congress prohibited the FmHA from accepting prepayment of any loan made before or after the date of enactment unless the owner committed to maintaining the low-income features of the rental housing for either a 15-year or 20-year period from the date of the loan. § 502(b), 93 Stat. 1134-1135. The Act included an exception to that requirement for cases in which the FmHA determined that there was no longer a need for the low-cost housing or if federal or other financial assistance provided to residents would no longer be provided. *Ibid.*

In 1980, Congress further amended the National Housing Act to eliminate retroactive application of the Section 515 prepayment changes enacted in the 1979 legislation. The Housing and Community Development Act of 1980, Pub. L. No. 96-399, 94 Stat. 1614, provided that the prepayment restrictions included in the 1979 legislation would apply only to loans entered into after

the date of enactment of that legislation, December 21, 1979. § 514, 94 Stat. 1671-1672.

3. In 1987, Congress again became concerned about the availability of low-and moderate-income rural housing in the face of increasing prepayments of mortgages under Section 515. A House of Representatives Committee found that the exhaustion of many of the tax benefits available to Section 515 participants was "driving owners to prepay or to refinance their FmHA loans, without regard to the low income and elderly tenants in these projects." H.R. Rep. No. 122, 100th Cong., 1st Sess. Pt. 1, at 53 (1987).

In response, Congress passed the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA), Pub. L. No. 100-242, Tit. II, 101 Stat. 1877, which, *inter alia*, amended the Housing Act of 1949 to impose restrictions upon prepayment of Section 515 mortgages that were entered into before December 21, 1979. This legislation, enacted on February 5, 1988, required that before FmHA accepted an offer to prepay a mortgage entered into before December 21, 1979:

> the [FmHA] shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed.

Pub. L. No. 100-242, § 241, 101 Stat. 1886. The legislation further provided that the FmHA could include a number of enumerated incentives in such an agreement, including an increase in the rate of return on investment, reduction of the interest rate on the loan, and an equity loan. Pub. L. No. 100-242, § 241, 101 Stat. 1886-1887.

Under ELIHPA, if the FmHA determined after a "reasonable period" that an agreement would not be entered into, the FmHA would require the owner to offer to sell the housing to "any qualified nonprofit organization or public agency at a fair market value determined by 2 independent appraisers." Pub. L. No. 100-242, § 241, 101 Stat. 1887. If an offer was not made within 180 days, the FmHA could accept the offer to prepay or request refinancing. *Ibid.* The offer for sale requirement would not apply if (1) the owner agreed to utilize the housing for the purposes set out in Section 515 for a period designated by the FmHA and then offer to sell the housing to a nonprofit organization or public agency, or (2) the FmHA determined that housing opportunities for minorities "will not be materially affected" by prepayment and the housing tenants either will not be displaced by prepayment or there is an "adequate supply" of "affordable" housing in the market area available to displaced tenants. Pub. L. No. 100-242, § 241, 101 Stat. 1889.

The FmHA promulgated regulations to implement ELIHPA on April 22, 1988, and those regulations became effective on May 23, 1988. 53 Fed. Reg. 13,245 (1988) (7 C.F.R. 1965.90 (1989)).

4. In 1992, Congress passed the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (codified in relevant part at 42 U.S.C. 1472(c) (1994)) (the "1992 legislation"). That legislation amended the Housing Act of 1949 to apply the prepayment restrictions imposed upon pre-1979 Section 515 loans in ELIHPA to Section 515 loans made from December 21, 1979, until enactment of the 1989 legislation. Pub. L. No. 102-550, § 712, 106 Stat. 3841. In other words, after that statute was enacted, loans made after December 21, 1979 but before 1989 were subject

to the same provisions as those applied under ELIHPA to pre-1979 loans, such as those of petitioners.

5. Petitioners in *Franconia Associates* filed this action in the Court of Federal Claims on May 30, 1997. Petitioners alleged that ELIHPA and the 1992 legislation repudiated their loan contracts and effected a taking under the Fifth Amendment. The Court of Federal Claims granted the government's motion to dismiss the complaints on grounds that they were filed more than six years after they "first accrue[d]" and were therefore filed beyond the limitations period provided for by 28 U.S.C. 2501. Pet. App. A23. The court held that petitioners' contract claims first accrued on May 23, 1988, the effective date of regulations implementing ELIHPA. The court reasoned that "as of [that date], * * * borrowers could no longer prepay their contracts without first going through lengthy and onerous procedures," a result that "was clearly in contravention of the government's clear promise to allow an *unfettered* prepayment right." *Id.* at A29, A31. Because petitioners had not filed their action until 1997, their claims did not fall within the six-year statute of limitations under 28 U.S.C. 2501. Pet. App. A34. The court also, *sua sponte*, dismissed petitioners' taking claims, holding that those claims also accrued upon the effective date of regulations implementing ELIHPA. *Ibid.*

6. On February 15, 2001, the United States Court of Appeals for the Federal Circuit affirmed the lower court's dismissal of the *Franconia Associates* petitioners' claims. Pet. App. A1. The court of appeals explained that "FmHA's contractual duty in this case was to continue to allow borrowers the unfettered right to prepay their loans at any time." *Id.* at A10. The court found that, "[i]f that continuing duty was

breached, the breach occurred immediately upon enactment of ELIHPA, because, by its terms, ELIHPA took away the borrowers' unfettered right of prepayment." *Ibid.* Accordingly, plaintiffs' contract claims were barred because they had not been filed within six years of the enactment of ELIHPA. *Id.* at A9. The court of appeals also affirmed the trial court's dismissal of petitioners' taking claims, holding that ELIHPA "took away and conclusively abolished a material contract right"—"[petitioners'] unfettered right to prepay their FmHA loans at any time." *Id.* at A14. The alleged taking of which petitioners complained, therefore, occurred upon the enactment of ELIHPA. *Id.* at A14.[1]

7. Meanwhile, on September 16, 1998, the *Grass Valley Terrace* petitioners filed an action virtually identical to the *Franconia Associates* action in the Court of Federal Claims. On April 12, 2000, the Court of Federal Claims granted the government's motion to dismiss the claims of those petitioners. Pet. App. A45. The court reasoned that the "performance required of the Government was to allow the pre-1979 Plaintiffs the option to prepay at any time," and "the enactment of ELIHPA constituted an actual breach rather than an anticipatory repudiation because it immediately altered the right of [petitioners] to prepay at any time at their option." *Id.* at A55. Accordingly, the court held that the petitioners' claims accrued upon the enactment of

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[1] The court of appeals held that the district court had erred in holding that the cause of action accrued on the date the regulations took effect (May 23, 1988), rather than the date ELIHPA was enacted (Feb. 5, 1988). Pet. App. A12 n.3. Nothing in this case turns on that distinction, however, since petitioners took far more than six years to file their claims, regardless of which date is used.

ELIHPA, more than six years before petitioners filed their action. *Id.* at A58.

8. On May 17, 2001, the United States Court of Appeals for the Federal Circuit affirmed the lower court's dismissal of the *Grass Valley Terrace* petitioners' claims, in a brief *per curiam* order without opinion. Pet. App. A15.

ARGUMENT

The decisions of the court of appeals are correct and do not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. a. Under 28 U.S.C. 2501, "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." That provision is "an express limitation on the Tucker Act's waiver of sovereign immunity." Pet. App. A8 (quoting *Hart* v. *United States*, 910 F.2d 815, 817 (Fed. Cir. 1998)). Accordingly, it must be strictly construed. *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 399 (1976). As the court of appeals explained, a cause of action first "accrues" for purposes of the Section 2501 statute of limitations "when all events have occurred which fix the government's liability." Pet. App. A8 (quoting *Kinsey* v. *United States*, 852 F.2d 556, 557 (Fed. Cir. 1988)).

In this case, all such events had occurred by February 5, 1988, the date that ELIHPA was enacted. Before that date, petitioners had entered into contracts that included an "unconditional promise on the part of FmHA to allow borrowers to prepay their loans * * * at any time." Pet. App. A10. By petitioners' own account (see Pet. 8), ELIHPA itself eliminated that

"unfettered" right, because it "drastically limited the circumstances under which the agency could accept" prepayments. After the enactment of ELIHPA, the law prohibited FmHA from "accepting any offer to prepay" until it had "ma[d]e reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing" for at least 20 years. 42 U.S.C. 1472(c)(4)(A). Moreover, if "after a reasonable period," no such agreement is possible, FmHA "shall require the borrower * * * to offer to sell the assisted housing" to "any qualified nonprofit organization or public agency at a fair market value determined by 2 independent appraisers." 42 U.S.C. 1472(c)(5)(A)(i). Finally, if no offer is made after 180 days, see 42 U.S.C. 1472(c)(5)(A)(ii), or if, regardless of the above process, FmHA determines "that housing opportunities of minorities will not be materially affected as a result of the prepayment" and certain other conditions are met, 42 U.S.C. 1472(c)(5)(G)(ii), it may accept the offer to prepay.

In light of the significant restrictions imposed by ELIHPA on petitioners' hitherto alleged "unfettered" right to prepay, their cause of action for a breach of contract accrued on February 5, 1988, the date on which ELIHPA was enacted. As of that date, the law eliminated their unfettered right to prepay and FmHA's ability to accept any tendered prepayment.[2] Petitioners had a full six years from that date in which to

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[2] Cf. *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980) (limitations period under Title VII dates from time that plaintiff was told he would be denied tenure, not date on which his employment was actually terminated); see also *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (per curiam) (applying *Ricks*).

file their claim for breach of contract. Because petitioners brought their actions more than nine years after that date, however, both courts below correctly concluded that they were barred by Section 2501's statute of limitations.

b. Petitioners contend (Pet. 15) that "[t]he Federal Circuit's decision in this case * * * rejects contract claims against the government as time-barred when indistinguishable claims brought against a private party would be deemed timely and heard on their merits." First, there is no reason that results under Section 2501 necessarily must mirror results in cases applying statutes of limitations to private parties. Section 2501 is a statute of limitations that applies solely to claims "of which the United States Court of Federal Claims has jurisdiction," 28 U.S.C. 2501, and it therefore applies only to claims against the government. Unlike statutes of limitations applicable to private parties, Section 2501 is a waiver of sovereign immunity, and thus it must be strictly construed. For those reasons, there can be no direct comparison between the limitations period applicable to the government under Section 2501 and the limitations period applicable to a private party.

In any event, the Federal Circuit simply applied settled principles governing the limitation of actions to the particular context of this case, in which a law had the effect of breaching a particular contractual term. Petitioners focus on the doctrine of anticipatory repudiation, which they claim (Pet. 17-21) the court of appeals misapplied. The court of appeals, however, did not misstate the legal principles relevant to the doctrine of anticipatory repudiation. The court of appeals expressly recognized the doctrine of anticipatory repudiation, see Pet. App. A10 ("An anticipatory repudiation occurs when an obligor communicates to an obligee that he will commit a breach in the future."), correctly stated its effect on statutes of limitations, see *ibid.* ("[T]he normal rule is that the statute of limitations begins to run from the date of performance specified in the contract unless the obligee elects to sue earlier for anticipatory repudiation."), and acknowledged its general applicability to the government, see *ibid.* ("[I]f the enactment of ELIHPA was not a breach, * * * then [petitioners'] claims did not accrue until some subsequent action by the government brought about an actual breach."). However, although it recognized the principles of law governing an anticipatory repudiation and their application to the government, the court of appeals simply found that ELIHPA did not constitute an anticipatory repudiation.

The court of appeals held that the doctrine of anticipatory repudiation does not apply in this case "because[] the enactment of ELIHPA constituted an alleged breach, rather than just a repudiation, of the obligation to allow prepayment of the FmHA loans at any time." Pet. App. A10-A11. This was not a case, analogous to most private anticipatory repudiation cases, in which a government official or agency simply announced that it was not going to honor a contractual obligation. In a case like that, the anticipatory repudiation doctrine has full force, because "[t]he plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation." A. Corbin, *Corbin on Contracts* § 989 (1964). The enactment of ELIHPA, however, differed substantially from an anticipatory repudiation.[3] After the enactment of

[3] Petitioners contend (Pet. 21) that the court of appeals "found that, although Petitioners had the right to prepay their mortgages

ELIHPA, the law no longer permitted petitioners to exercise an "unfettered right to pay their loans at any time." Pet. App. A10. Nor was it possible for the FmHA to change its mind and decide to accept prepayment, because any such action would have been illegal under ELIHPA. Because ELIHPA itself "took away the borrowers' unfettered right of prepayment," *ibid.*, the alleged breach took place when ELIHPA was enacted.[4] The court of appeals' rejection of petitioners'

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at any time, the government had no reciprocal duty to accept such prepayments when tendered by owners." The court of appeals did not make such a finding. The court did note that "the note's prepayment provision did not require any performance on the part of the government because it constituted an unconditional promise on the part of FmHA to allow borrowers to prepay their loans, an obligation which extended for the life of the loan." Pet. App. A10. In context, that statement simply made the point that the prepayment clause did not require any government performance *aside from* permitting petitioners to prepay their note. The court of appeals clearly recognized that, under the prepayment clause, petitioners "were allowed to prepay their indebtedness at any time," *id.* at A10, and that the government "breached that promise, if at all, through the enactment of ELIHPA," *id.* at A11. Indeed, if the court had believed that the government was under no contractual obligation to accept petitioners' prepayments, then the court would have had to hold that ELIHPA had no effect at all on petitioners' contractual rights.

[4] Citing the Ninth Circuit's decision in *Kimberly Associates* v. *United States*, 261 F.3d 864 (2001), petitioners argue that "the government was not acting in its capacity as the sovereign when it enacted ELIHPA," and what they term "the government's repudiation of Petitioners' contracts should not be afforded any special status simply because it came in the form of legislation." Pet. 16. *Kimberly Associates* concerned application of the "unimistakability doctrine," and in that context the Ninth Circuit believed it significant that the government "was not acting in a 'public and general' capacity" when it enacted ELIHPA. 261 F.3d at 870. This case, however, is not about the "unmistakability doctrine."

anticipatory repudiation theory, accordingly, was correct. Moreover, even if the court below mischaracterized the effect of ELIHPA, that particular application of law to fact would not warrant this Court's review.

c. Petitioners contend that the decision of the court of appeals is inconsistent with this Court's decision in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000). In that case, plaintiffs paid the government more than $156 million for mineral drilling leases that permitted them to drill "provided that [the plaintiffs] received exploration and development permissions in accordance with various statutes and regulations to which the lease contracts were made 'subject.'" *Id.* at 609. After plaintiffs had submitted drilling plans to the relevant government agencies, Congress passed a statute that added additional regulatory approval requirements. *Id.* at 611-612. The Court held that plaintiffs were entitled to restitution of the money they paid the government under the leases.

Petitioners argue (Pet. 18-19) that the Court in *Mobil* "recognized the critical distinction between the

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Nor does it concern the "sovereign acts" doctrine to which petitioners refer and which generally applies only when the government acts in a "public and general" capacity. See Pet. 16 n.12; see generally *United States* v. *Winstar*, 518 U.S. 839, 891-910 (1996) (plurality opinion). Instead, this case concerns the date of "first accrual" of a cause of action under 28 U.S.C. 2501. For that purpose, the court of appeals correctly recognized that there is an important distinction between a statute that itself breaches a contract by eliminating a contractual right and a government action that amounts merely to an anticipatory repudiation of the government's obligation to perform a contract. That remains true regardless of whether the statute or contract at issue satisfy the requirements of the unmistakability or sovereign acts doctrines.

enactment of legislation by Congress, which amounts to only an anticipatory repudiation of affected contracts, and the later *implementation* of that legislation by the contracting agency, which can result in an actual breach." Pet. 18-19. This Court, however, made no such distinction in *Mobil*. *Mobil* did not involve the application of a statute of limitations, and nothing in *Mobil* turned on whether the statute at issue there was an anticipatory repudiation or an actual breach of the government's contract. To the contrary, the Court explained that the controlling legal principle in *Mobil* was that "[i]f the Government said it would break, *or did break*, an important contractual promise, * * * then * * * the Government must give the companies their money back." 530 U.S. at 608 (emphasis added). Accord *id.* at 614 (noting that the government "concedes, as it must, that relevant contract law entitles a contracting party to restitution if the other party 'substantially' breached a contract *or* communicated its intent to do so") (emphasis added).

Because the governing legal standard in *Mobil* did not turn on whether the government had merely "said it would break" the contract or instead "did break" it, the Court had no occasion to examine the differences between an anticipatory repudiation and a breach. Accordingly, in the balance of the Court's discussion, the Court referred to "repudiation" and "breach" interchangeably. See, *e.g.*, 530 U.S. at 607 ("We agree that the Government broke its promise; it repudiated the contracts."); *id.* at 618 (statute "made clear * * * that the United States had to violate the contracts' terms and would continue to do so"). Similarly, although the Court in some places referred to the statute in *Mobil* as a "repudiation," see *e.g.*, *id.* at 620, 621, the Court in other places referred to the statute as

itself constituting a "breach" of the contract.[5] *Mobil* did not address the question presented by petitioners and provides no support for petitioners' claim here.[6]

2. The court of appeals correctly determined that petitioners' taking claims also accrued upon enactment of ELIHPA. As recognized by the court of appeals, liability for a taking "first accrues" under 28 U.S.C. 2501 when the property at issue is taken. *Seldovia Native Ass'n* v. *United States*, 144 F.3d 769, 774 (Fed. Cir. 1998). Here, the only "property" that could have been taken was petitioners' contractual prepayment right.[7]

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[5] See, *e.g.*, 530 U.S. at 618 ("We conclude * * * that the Government violated the contracts."); *id.* at 621 (stating that the government does not deny "that the United States repudiated the contracts *if* (as we have found) [the statute's] changes amounted to a *substantial breach*") (emphasis added); *id.* at 621 ("The breach was 'substantia[l],' depriving the companies of the benefit of their bargain.").

[6] Similarly, none of the other appellate cases on which petitioners rely (Pet. 19) concerned application of a statute of limitations, and the legal questions in each case concerned contract and statutory terms that differed substantially from those in this case. We note that one of the cases cited by petitioners, *Schism* v. *United States*, 239 F.3d 1280, 1290 (Fed. Cir. 2001), has been vacated pending en banc review. See *Schism* v. *United States*, 252 F.3d 1354 (Fed. Cir. 2001).

[7] Petitioners assert (Pet. 29) that they did not claim a taking of their contractual rights, but "a taking of their state-created real estate interests." By signing their contracts with the government, however, petitioners contracted away those "real estate interests." See Pet. 29 n.28 (referring to "the right to economically productive use and enjoyment, the right to exclusive possession, and the rights to transfer, devise, and dispose of their properties"). ELIHPA itself had no effect on petitioners' "real estate" interests; instead, it simply limited petitioners' contractual prepayment rights. It is not the case that every government violation of a con-

Leaving aside whether such a right necessarily constitutes property under the Fifth Amendment, but cf. *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 19 n.16 (1977), the contractual right at issue could have been taken only when the contract was breached. Because the contractual breach occurred when ELIHPA was enacted, it follows that any taking occurred simultaneously.

a. As an antecedent matter, petitioners' taking and contract claims are not distinct from each other, and accordingly, insofar as taking claims may be brought in this context at all, such claims necessarily "first accrue[]" at the same time as the contract claims. Cf. *Sun Oil Co.* v. *United States*, 572 F.2d 786, 818 (1978). Insofar as the government breached the contracts with petitioners, they had no independent takings claims because they had available a remedy in damages that was sufficient to provide "just compensation" under the Fifth Amendment. Insofar as the government did not breach the contracts with petitioners, they had no independent takings claims because their only rights were to the contractual performance that was in fact rendered by the government. See *Sun Oil Co.*, 572 F.2d at 818; see also *Transpace Carriers, Inc.* v. *United States*, 27 Fed. Cl. 269, 274 (1992); *Marathon Oil Co.* v. *United States*, 16 Cl. Ct. 332, 338-339 (1989). Because petitioners' taking claims are thus entirely parasitic on their contract claims, their taking claims necessarily "first accrued" at the same time as the contract claims did.

b. Petitioners contend (Pet. 24) that the court of appeals' holding is inconsistent with decisions in which,

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tract involving real estate is a "taking" of the underlying "real estate interest," as petitioners' contention would suggest.

according to petitioners, this Court has held "that a taking claim based on a statute or regulation that allows for a discretionary agency decision on the scope of permissible use of the property at issue is not ripe for review until the agency renders such a decision." As the cases cited by petitioners demonstrate, however, that rule applies to takings claims involving real property. See Pet. 25 (citing *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (alleged taking of real property containing wetlands); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (alleged taking of property rights in coal mines)). In such cases, the right at issue is not the right to be free of government restrictions, but the right to engage in the owner's desired use. Accordingly, the question whether that right has been taken cannot be determined until the agency has ruled on whether—and the extent to which—the owner may engage in the desired use of the property.

By contrast, this case arises in the entirely different context of an alleged taking of the contractual right consisting of the "unfettered right to prepay [petitioners'] FmHA loans at any time" as provided for in the prepayment clause, Pet. App. A14—*i.e.*, the right to be free of regulatory restrictions on prepayment altogether. As the court of appeals correctly held, if it took anything, ELIHPA "took away and conclusively abolished" that right because ELIHPA "prohibited FmHA from allowing unrestricted prepayments." *Id.* at A14.[8]

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[8] Petitioners contend (Pet. 25) that ELIHPA did not take their contract right because it permits owners to prepay if FmHA determines that several conditions are satisfied concerning housing opportunities of minorities and the availability of replacement housing for tenants. Petitioners err (Pet. 27) in characterizing that limited ability of FmHA to accept a prepayment as an ability "to

Accordingly, petitioners' taking claims accrued when ELIHPA became law. Because petitioners waited more than six years from that date before filing their claims, they were time-barred.

c. Contrary to petitioners' contention (Pet. 26-27), the court of appeals' decision does not conflict with its own prior decision in *Greenbrier* v. *United States*, 193 F.3d 1348 (Fed. Cir. 1999), cert. denied, 530 U.S. 1274 (2000). In *Greenbrier*, the court of appeals held that the claims of HUD-insured housing owners alleging that ELIHPA and other legislation effected a taking were not ripe because plaintiffs had not applied to the agency to prepay their loans. *Id.* at 1360. Unlike in this case, the plaintiffs in *Greenbrier* "were not in privity of contract with respect to the notes' prepayment," because the government was not a party to the prepayment provisions of the notes. *Id.* at 1355. Whatever private contracts they had signed concerning their prepayment rights were thus necessarily conditioned by the possibility of legislation that subjected their prepayment rights to some degree of government regulation. Because the plaintiffs claimed a "regulatory taking," see *id.* at 1357, their claim that their contract rights had been subject to such a taking was not ripe until the precise restriction imposed on their prepayment rights by government regulation became clear.

This case arises in the very different setting in which both petitioners and the government were parties to the contracts at issue, including the prepayment provi-

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accept prepayment requests without restriction." After ELIHPA, there are always restrictions on prepayments rights; one of them is a restriction on the right to prepay unless the specified statutory findings have been made. Accordingly, as the court of appeals recognized, ELIHPA eliminated their "unfettered right to prepay their FmHA loans at any time." Pet. App. A14.

sions. Unlike the plaintiffs in *Greenbrier*, petitioners obtained a clause granting them what they claim to have been an "unfettered right to prepay," Pet. App. A14—*i.e.*, a government promise not to impose any regulatory restrictions on their ability to prepay at any time, at their option. See Pet. 20 ("Petitioners' contracts granted them the option to prepay their mortgages at any time that they desired during their fifty-year mortgage terms."). That contract right differed substantially from the contract right at issue in *Greenbrier*, where no such promise *by the government* could be found. Accordingly, while the regulatory taking claim in *Greenbrier* was not ripe until the scope of the regulatory restriction on the private contract became clear, the taking claim in this case became ripe as soon as the government enacted ELIHPA, which itself allegedly eliminated petitioners' alleged contractual right to be free of government-imposed conditions on their prepayments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-455

In the

Supreme Court of the United States

FRANCONIA ASSOCIATES, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

◊

GRASS VALLEY TERRACE, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent's opposition contains numerous arguments and admissions that demonstrate the appropriateness of, and necessity for, Supreme Court review here. For example:

- The government claims that it is exempt from standard contract law principles, insofar as those principles touch upon the statute of limitations under 28 U.S.C. § 2501.
- The government asserts that legislation passed by Congress can immediately "eliminate" rights under government contracts, even without any action by the contracting agency.

The government also severely misstates and improperly attempts to limit this Court's recent decision in *Mobil* and its expansive precedent on the ripeness of regulatory taking claims, demonstrating the extent to which its positions will engender confusion in these areas of the law. For these reasons, the government's opposition aptly demonstrates the "cert. worthiness" of the issues raised in the Petition.

I. Under Standard Contract Law Principles, Petitioners' Contract Claims Were Filed In A Timely Manner.

A. Respondent Seeks A "Section 2501 Exemption" From Standard Contract Law Principles.

This Court has held time and again that when the government enters into contracts with private parties, "its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *See* Pet. 14-15. Respondent, however, goes so far as to assert that it is *not* bound by ordinary contract law principles when the statute of limitations that applies solely to claims against the government, 28 U.S.C. § 2501, comes into play. Opp. 10 ("there is no reason that results under Section 2501 necessarily must mirror results in cases applying statutes of limitations to private parties' and "there can be no direct comparison" between the two). Thus, respondent asserts

that even if petitioners' claims would be deemed timely under the doctrine of anticipatory repudiation in a private contract dispute, the courts should apply a different rule in contract actions against the government that would permit such claims to be dismissed as untimely.

The government provides no authority for its unprecedented position that Section 2501 provides it refuge from standard contract law. Such an exemption, permitting the government to obtain dismissal of claims that would be heard on their merits in a commercial contract dispute, would broadly expand "the Government's opportunities for contractual abrogation" and would have "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *United States v. Winstar Corp.*, 518 U.S. 839, 844 (1996) ("*Winstar*"). Respondent's assertion that it can avoid the rules governing private contracts when Section 2501 is concerned, by itself, warrants Supreme Court review. This Court should grant certiorari here if only to hold the government accountable to standard contract law and protect "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." *Id.* at 883.

B. Legislation Cannot "Eliminate" Contract Rights.

The main issue presented in this case is whether legislation passed by Congress can "eliminate" and effect an immediate breach of contracts entered into by an executive agency without any corresponding action by that agency. Citing no relevant authority, the government asserts that it can. Opp. 9 (asserting that petitioners' claims accrued on the date that the legislation was passed because "the law eliminated" their contract rights). As explained in the petition, however, Congress cannot and does not, through legislation, breach contracts that agencies have entered into with private parties. Rather, some action by the agency is required for a breach to occur. *See* Pet. 15-21. As a result,

the statute at issue amounted to no more than an anticipatory repudiation of the government's obligations. *Id.*

The government's belief that legislation can immediately abrogate contract rights might be plausible if the legislation qualified as a "sovereign act." In that situation, the government might argue that because the law is "public and general" in its impact (*see Winstar*, 518 U.S. 839, 879 n.22 (1996)), rights under affected contracts could essentially disappear upon the enactment of the law. In this case, however, the government concedes that it cannot rely on the sovereign acts or unmistakabilty doctrines to justify its actions. Opp. 12-13 n.4. This is because the statute at issue "constituted a narrow, targeted piece of legislation aimed at relieving the government from onerous provisions contained in a finite number of specific contracts it had already entered" and therefore was not protected by the government's sovereign defenses. *Kimberly Assoc. v. United States*, 261 F.3d 864, *reh. denied* No. 99-35188 (9th Cir. 2001); *accord Adams v. United States*, 42 Fed. Cl. 463, 480 (1998). Accordingly, there is no basis for respondent's argument that the legislation had the power to immediately "eliminate" petitioners' contract rights.[1]

C. The Agency With Whom Petitioners Contracted, Not Congress, Breached The Contracts.

The fact that Congress cannot eliminate contract rights and that only contracting agencies can breach government contracts is made clear by this Court's application of the

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[1] "The terms of a government contract, like any other contract, do not change with the enactment of subsequent legislation absent a specific contractual provision providing for such a change." *Winstar Corp. v. United States*, 64 F.3d 1531, 1547 (Fed. Cir. 1995). In this case, the contracts do not contain any such provision permitting for changes by way of legislation, and in fact stated that the terms of the contracts could only be "changed by agreement between [the parties] after this agreement becomes contractually binding." The contracts further state that any such agreement "must be in writing." Pet. App. A173, ¶12(c),(d).

Restatement (Second) of Contracts ("Restatement") § 250 in *Mobil Oil Exploration & Producing SE, Inc. v. United States*, 530 U.S. 604 (2000) ("*Mobil*"). *See* Pet. 17-19. There, the Court held that a statute announcing that the government would no longer honor the terms of lease contracts entered into with oil companies constituted a "repudiation" as defined by the Restatement § 250: "a statement by obligor to the obligee indicating that the obligor will commit a breach." *Id.* at 608, 619 ("if legislation passed by Congress and signed by the President is not a 'statement by the obligor,' it is difficult to imagine what would constitute such a statement").

Respondent attempts to avoid *Mobil* only by severely mischaracterizing it. First, respondent denies that the Court held that the legislation at issue constituted a repudiation of the contracts, stating that the decision could be construed as holding that the statute effected an immediate, rather than prospective, breach. Opp. 14-15. However, one need only read the opinion and the language of the Restatement § 250 to see that the case cannot possibly be understood as respondent suggests. The Court began by explaining the contract principles regarding repudiation and then held that the legislation at issue constituted just such a repudiation under the Restatement. *Id.* at 608, 619-21. Although the Court acknowledged that the government ultimately may have breached the contracts, it consistently described the *legislation* as a "repudiation," *i.e.*, a "statement" of the government's "intent" to breach the contracts. *Id.* at 619, 620, 621. The Court's introductory remarks leave no doubt as to its holding: "We agree that the Government broke its promise; it *repudiated* the contracts; and it must give the companies their money back." *Id.* at 607 (emphasis added).[2]

[2] A brief review of § 250 of the Restatement likewise extinguishes any doubt as to the Court's holding. *See, e.g.*, Restatement at 271 (rules under topic "Effect of Prospective Non-Performance" described as being designed to afford protection where a party impairs the other party's expectation of performance *before* the time for performance arrives); *id.* at

Second, respondent asserts that "nothing in *Mobil* turned on whether the statute at issue there was an anticipatory repudiation or an actual breach of the government's contract." Opp. 14. The government is wrong again. The Court's holding that the legislation at issue constituted a repudiation under the Restatement § 250 was critical to its holding that the remedy of restitution was available to the contractors under the Restatement § 373. *Id.* at 608, 624 (holding that "if one party to a contract . . . advances the other party money, principles of restitution normally require the latter, *upon repudiation*, to refund that money") (emphasis added). Thus, if the legislation had not constituted a repudiation, the contractors would not have been able to recover the restitution award they obtained. *See id.*[3]

Finally, in order to bolster its position that Congress "eliminated"—rather than merely repudiated—the contract rights at issue by passing a law, respondent argues that the FmHA's failure to perform its contractual duty to accept prepayment requests when made by owners has no

273, Illustration 1 ("On April 1, A contracts to sell and B to buy land, delivery of the deed and payment of the price to be on July 30. On May 1, A tells B that he will not perform. A's statement is a repudiation.").

[3] Respondent suggests that the only situation where the doctrine of anticipatory repudiation might apply in the government contract context is where "a government official or agency simply announced that it was not going to honor a contractual obligation." Opp. 11. By making this analogy, respondent further demonstrates its misunderstanding of the holding in *Mobil* and its belief that legislation could never be construed as a repudiating act. Respondent also contends that legislation differs from a repudiation by a private party because legislation cannot be retracted. Opp. 11-12. History has proven, however, the contrary. In fact, the government had earlier repudiated petitioners' contracts by passing a law in 1979 that restricted the ability of the FmHA to accept loan prepayments, but then retracted that repudiation by passing another law in 1980 that restored the agency's authority. *See* Pet. 7-8 n.5; *see also Mobil*, 580 U.S. at 621 (noting that the government did not argue that it "retracted" its legislative repudiation). Thus, respondent's contention that the doctrine of anticipatory repudiation has no place in the realm of legislative acts is erroneous.

relevance to the question of when the government breached the contracts. Significantly, the government finally admits a critical fact that it had previously denied: that the FmHA had a duty to "accept" such requests. Opp. 3, 9, 11-12 n.3.[4] Yet it maintains that the Federal Circuit was correct in holding that "the note's prepayment provision did not require any performance on the part of the government . . . ." Opp. 12 n.3.[5] Having admitted that the FmHA had an affirmative duty to perform by accepting prepayment requests, the government cannot escape the conclusion that the legislation was no more than an anticipatory repudiation

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[4] Before the Federal Circuit, respondent argued that petitioners were "mistaken in asserting that the performance required of the FmHA under the prepayment term was to accept prepayment if and when it was offered by a borrower." App. Bf. at 29 (*Franconia*), 25 (*Grass Valley*).

[5] Respondent's claim that the lower court's holding is limited to the proposition that "the prepayment clause did not require any government performance *aside from* permitting petitioners to prepay their note" (Opp. 12 n.3) is inaccurate: the holding, in fact, *affirms* the *Franconia* trial court's analysis that:

> no performance by the government is required—it is merely a promise *to allow* the borrower to prepay. . . . The government's performance, if it can be called that, is to keep its promise *to allow* borrowers an unfettered prepayment right. No further performance was required by the government. . . ."

Pet. App. A31 (emphasis added). Thus, the Federal Circuit held—in accord with the government's own former position below—that the government's performance under the contractual prepayment clause was merely "to keep its promise" *to allow* an owner to prepay, not *to accept* a prepayment from an owner, and that ELIHPA therefore constituted an immediate breach because it *disallowed* the prepayment right. This holding, which is wholly inconsistent with the government's admission that the agency did have a duty to accept prepayments, is also directly contrary to the Federal Circuit's holding in *Greenbrier v. United States*, 193 F.3d 1348, 1357 (Fed. Cir. 1999) (ELIHPA prepayment restrictions do not *disallow* owners from submitting prepayment requests but rather place additional conditions on the government's ability *to accept* such requests when made). *See also* Pet. 22-23 (detailing the procedures FmHA must follow to "accept" an offer to prepay, including accepting final payment and releasing the security to the owner).

of the contracts, which did not ripen into an actual breach until the agency failed to perform its obligation to accept such requests. *See* Pet. 21-24; *see also Mobil*, 530 U.S. at 620 (finding government consideration of plans submitted by contractors to be a "necessary reciprocal obligation" without which the contracts would be rendered "illusory").

D. Respondent Mischaracterizes Petitioners' Claims.

Respondent attempts to support its unprecedented arguments by fundamentally misstating petitioners' claims. Respondent repeatedly refers to the contract right at issue as an "unfettered" right to prepay, and argues that petitioners' claims accrued when the legislation rendered that right no longer "unfettered." Opp. 6-7, 8-9, 11-12, 17, 19. That terminology, however, finds no source in the Petition or petitioners' pleadings. In reality, petitioners have always alleged that the legislation amounted to an anticipatory repudiation of their contracts and that a breach occurred when the FmHA failed to perform its contractual duty to accept prepayment requests when made. Pet. App. A112-13, A123, A126, A128-29, A132-33. Thus, if anything was "fettered" by the legislation, it was the agency's *obligation to accept* prepayments, not the prepayment *right* itself. *See* Pet. 22 n.18. In any event, no support exists for the government's theory that petitioners' contract claims accrued when their rights were "fettered," as opposed to when the agency breached by failing to perform its contractual obligation to accept prepayment requests.

* * *

Contract law is about rights, repudiations, and breaches. The application of standard contract law principles to this case is clear: (1) petitioners held a contractual right to prepay; (2) the government repudiated that right by passing legislation announcing that the contracting agency would not perform its contractual obligations when its performance came due; and (3) the contracting agency breached each petitioners' contract when it rejected their requests to

prepay. The government tries to avoid these conclusions by seeking an exemption from standard contract law principles and attempting to circumvent this Court's precedent.

II. Agency Action Also Was Required For Petitioners' Taking Claims To Accrue.

Respondent's attempts to justify the dismissal of petitioners' taking claims falls even shorter. Lacking any credible basis for distinguishing this Court's expansive precedent on the ripeness of regulatory taking claims, the government resorts to attacks on the merits of petitioners' claims and mischaracterizations of their property rights.

All of respondent's arguments are directed toward a taking claim that petitioners have not made. While petitioners specifically alleged a taking of state-created real property interests (*see* Pet. 28-29), respondent argues that petitioners' taking claims must be construed as asserting only the taking of a contract right—an "unfettered right to prepay" to be precise. Respondent then asserts that any such taking must have occurred when the law allegedly "eliminated" that right. Opp. 15-18. This is the same "straw man" argument that the Federal Circuit devised: propping up a claim different from the one that petitioners made and then striking that claim down. Respondent's attempts to recast petitioners' claims to suit its needs should be ignored.

Respondent does not argue that this "taking of a contract right" is the claim that petitioners have alleged, but rather that this is the only taking claim that respondent believes is viable. Opp. 15-16 (asserting that this is "the only 'property' that could have been taken"). Apart from being wrong as a matter of law,[6] this attack on the merits of petitioners' claims

[6] Respondent argues that petitioners' taking claims must be viewed solely as a taking of contract rights because petitioners "contracted away" their real property interests. Opp. 15 n.7. However, petitioners lost their rights in their land by entering into a loan agreement and mortgage with the government no more than a homeowner loses all rights to his or her house by taking out a mortgage. Further, petitioners' agreement to dedicate their properties to a certain use for a limited period of time does not in any way negate their property rights. *See, e.g., Prudential Ins. Co. v. United States*, 801 F.2d 1295, 1300, n.13 (Fed. Cir. 1986); *see also Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).

is premature. The trial court ruling at issue was made *sua sponte* on the government's motion to dismiss on limitations grounds. Thus, at this stage, the only relevant question is whether the taking claims petitioners alleged were filed in a timely manner. Respondent's substantive challenge to petitioners' taking claims only serves to reveal the lack of any persuasive grounds for upholding the decisions below.

Regardless of how it construes petitioners' taking claims, respondent cannot escape the key fact that the courts below overlooked: that under the scheme set up by the legislation, the FmHA is authorized to accept owners' requests to prepay and permit them to leave the Section 515 program if certain criteria are met. *See* Pet. 9, 25-26. As a result, this Court's precedent holding that an "as-applied" regulatory taking does not accrue until the agency makes a decision on the scope of permissible use of the property applies with full force. *See* Pet. 25-29. Respondent's only attempt to avoid this precedent is its argument that those cases have no application outside of the land use context. As noted above, however, petitioners do in fact allege a taking of their real property rights. Further, there is no basis for respondent's proposed limitation of the Court's precedent to cases involving land use restrictions.

Finally, respondent asserts that the ruling below—that petitioners' taking claims accrued immediately upon the enactment of the legislation—is perfectly consistent with *Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999), which held that the taking claims of owners under a materially identical housing program administered by HUD did not accrue until the agency made a final decision on each owner's prepayment request. Abandoning its prior attempts

to distinguish the case, respondent asserts that *Greenbrier* is inapposite because the property rights at issue there were contained in a contract to which the government was not a party. Opp. 18. Once again, respondent cites no authority for the proposition that standard legal principles—this time regarding the law of takings—are somehow different where a contract with the government is involved. Moreover, nothing in *Greenbrier* turned on the nature or source of the property right at issue. Rather, the holding was guided by the nature of the legislation, which, like the legislation here, provided an exception authorizing the agency to accept prepayments without restrictions when it determined that there was no longer a need for the housing. *Id.* at 9; *see* Pet. 2-3, 9, 26-30.

The conflicting results in *Greenbrier* and this case reveal the extent to which the government has been permitted to operate on dual tracks in the affordable housing prepayment litigation. In *Greenbrier*, the government obtained dismissal of the HUD owners' taking claims on ripeness grounds as having been filed too early. In *Franconia*, the government obtained dismissal of the materially identical taking claims of FmHA owners on limitations grounds as having been filed too late. The Court should grant certiorari in this case to correct this decisional flip-flop by the Federal Circuit and prevent the government from successfully arguing directly contrary positions in different cases to suit its needs.

CONCLUSION

For the reasons set forth above and in the Petition, the Court should grant certiorari in this case.

November 27, 2001

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No. 01-455

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QUESTIONS PRESENTED

1. Whether a breach of contract claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans.

2. Whether a Fifth Amendment takings claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The following parties are petitioners in *Franconia Associates v. United States:*

Dublin Plaza, Inc.
Evergreen Manor Associates
Fox Ridge Phase II
Franconia Associates
Marilyn Graham
Greenway of Altoona Associates, Phase I
Greenway of Newton Associates, Phase I
David A. Hodges, Sr.
David A. Hodges, Sr. and Joanne M. Hodges
Phoebe J. Perri
Pine Needles Apartments
Prairie Village of Altoona Associates
Prairie Village of Grimes Associates
Prairie Village of Huxley Associates
Prairie Village of LaPorte City Associates
Prairie Village of Slater Associates
Prairie Village of State Center Associates
R.C. Getty Apartments
R.C. Mo Apartments
R.C. Pierre Apartments
R.C. Springs Apartments
Scenic Valley Associates
Timberbrook Properties
Valley Associates
Brian E. Wells

The following parties are petitioners in *Grass Valley Terrace v. United States:*

Margorie W. Kassner
Eileen R. Kothe
NRCB Limited Partnership

Peters, Williams & Kubota
Pine Needle Apartments Limited Partnership
Richard and Beatrice Schmidtbauer
The Highlands, a Limited Partnership

The following parties are plaintiffs in the trial court action in *Franconia Associates v. United States,* but were not appellants before the Federal Circuit and are not petitioners herein:

Eastwood Apartments
Greenway of Altoona Associates, Phase II
Prairie Village of Adel Associates
Prairie Village of Parkersburg Associates
Tucker Properties
Tucker Properties II

The following parties are plaintiffs in the trial court action in *Grass Valley Terrace v. United States,* but were not appellants before the Federal Circuit and are not petitioners herein:

Grass Valley Terrace
Jefferson Commons
Ripon Manor
Rural Community Builders
Waterloo Glen

Pursuant to Rule 29.6, petitioners state that of the forty-three parties listed above, only one, Dublin Plaza, Inc., is a corporate entity. All other petitioners and parties to the proceedings below are either individuals, partnerships, or limited partnerships. There are no parent corporations or publicly held companies that own ten percent or more of the stock of Dublin Plaza, Inc.

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TEXT OF STATUTES AND REGULATIONS

The pertinent text of the statutes and regulations at issue in this matter is reproduced in the Appendix ("App.") attached to the Petition for Writ of Certiorari. *See* App. 71-105. The provisions most significant to the disposition of this petition are as follows:

28 U.S.C. § 2501 (1994)

Time for filing suit

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

42 U.S.C. § 1472(c) (1994)

Prepayment and refinancing provisions

* * *

(4)(A) Agreement by borrower to extend low income use.

Before accepting any offer to prepay, or requesting refinancing in accordance with subsection (b)(3) of this section of, any loan made or insured under section 1484 or 1485 of this title pursuant to a contract entered into prior to December 15, 1989, the Secretary shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed.

* * *

(5)(A) Offer to sell to nonprofit organizations and public agencies

(i) In general

If the Secretary determines after a reasonable period that an agreement will not be entered into with a borrower under paragraph (4), the Secretary shall require the borrower (except as provided in subparagraph (G)) to offer to sell the assisted housing and related facilities . . .

* * *

(G) Exception

This paragraph shall not apply to any offer to prepay, or any request to refinance in accordance with subsection (b)(3) of this section, any loan made or insured under section 1484 or 1485 of this title pursuant to a contract entered into prior to December 15, 1989, if –

* * *

(ii) the Secretary determines that housing opportunities of minorities will not be materially affected as a result of the prepayment or refinancing, and that –

(I) the borrower (and any successor in interest thereof) are obligated to ensure that tenants of the housing and related facilities financed with the loan will not be displaced due to a change in the use of the housing, or to an increase in rental or other charges, as a result of the prepayment or refinancing; or

(II) there is an adequate supply of safe, decent, and affordable rental housing within the market area of the housing and related facilities and sufficient actions have been taken to ensure that the rental housing will be made available to each tenant upon displacement.

7 C.F.R. § 1965.215 (2000)

Borrower rejection of incentive offer – approving/disapproving prepayment

* * *

(c) *Conditions under which prepayment may be approved.* In certain instances, prepayment may be approved after a borrower has rejected the incentive offer. . . . To determine whether a prepayment offer can be approved, the following decision steps must be followed by the Servicing Office:

(1) *The loan is not currently subject to restrictive-use provisions nor prohibition on prepayment.* To determine whether a loan not subject to restrictive-use provisions or prohibition on prepayment may prepay, and if so, what restrictions must be inserted in the release documents, the following determinations must be made.

* * *

(iii) If the Servicing Office determines that housing opportunities to minorities will not be materially affected as a result of prepayment, and that there is an adequate supply of safe, decent, and affordable rental housing within the market area for the foreseeable future, the borrower may prepay without restrictions. The provisions of paragraph (c)(3) of this section will apply.

* * *

(3) *It is determined by FmHA or its successor agency under Public Law 103-354 that restrictions are not needed.* If actions in accordance with § 1965.206(b)(2) of this subpart and paragraph (e)(3) of this section have been taken to ensure that alternative rental housing will be made available to each tenant upon displacement, the prepayment may be accepted without restrictions if:

* * *

(iii) Regardless of whether or not the loan is subject to restrictive-use provisions, a determination is made by FmHA or its successor agency under Public Law 103-354 that there is no longer a need for the housing (in accordance with exhibit E of this subpart).

BRIEF FOR PETITIONERS

OPINIONS BELOW

Franconia Associates v. United States, No. 97-381C, 43 Fed. Cl. 702 (May 9, 1999), *recons. denied*, 44 Fed. Cl. 315 (July 21, 1999), *aff'd*, No. 99-5123, 240 F.3d 1358 (Fed. Cir. Feb. 15, 2001), *reh. denied* (Fed. Cir. June 12, 2001) ("*Franconia*").

Grass Valley Terrace v. United States, No. 98-726C, 46 Fed. Cl. 629 (Apr. 12, 2000), *aff'd*, No. 00-5094 (Fed. Cir. May 17, 2001) (*per curiam*) ("*Grass Valley*").

JURISDICTION

Petitioners seek reversal of two closely-related decisions of the Federal Circuit. The Federal Circuit issued its opinion in *Franconia* on February 15, 2001. Petitioners timely filed a Petition for Rehearing En Banc, which the Federal Circuit denied on June 12, 2001. In the interim, the Federal Circuit issued a *per curiam* decision in *Grass Valley* on May 17, 2001.

This Court has jurisdiction under 28 U.S.C. § 1254(1). Petitioners filed a Consolidated Petition for Writ of Certiorari (the "Petition") on September 10, 2001 addressing both cases. The Petition was granted on January 4, 2002.

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 2501 (1994) (App. 82); Emergency Low Income Housing Preservation Act, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988) (App. 71-81); 42 U.S.C. § 1472(c) (1994) (App. 83-90); 7 C.F.R. § 1965.215 (2000) (App. 91-105).

STATEMENT OF THE CASE

Petitioners are owners of properties located throughout rural areas of the United States that currently are operated as affordable housing projects financed by mortgage loans

issued by the Farmer's Home Administration ("FmHA")[1] pursuant to Section 515 of the Housing Act of 1949 (the "Section 515 program"). This case involves an attempt by Congress to alter, by statute, the terms of petitioners' agreements in order to limit the FmHA's ability to permit petitioners to terminate their participation in the program. The narrow questions presented are when petitioners' contract and takings claims accrued for purposes of the six-year statute of limitations set forth at 28 U.S.C. § 2501. The answers to these questions require an understanding of the nature of the program, the terms of the parties' contracts, and the impact of the subsequent legislation on petitioners.

The Section 515 program was intended by the government to develop rental housing in rural populations not normally served by conventional lenders. Designed to be used as affordable housing only during that period of time that the housing is financed by a government mortgage loan, the government by contract required each owner to prepay its loan when commercial financing became available. In addition, each owner had the contractual option to terminate the use of its property as affordable housing by prepaying its loan at a time of its own choosing during the term of its mortgage. In either case, prepayment enabled the owners to use their properties as conventional housing. The monies from prepayment could then be used by the government to finance alternative affordable housing needs in rural communities. Thus, prepayment helped the government achieve the ultimate goal of developing both affordable and conventional housing in rural America.

Petitioners are aggrieved by the FmHA's application of subsequent legislation that authorizes the agency to permit owners to terminate their participation in the program only

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1 The FmHA was created as an agency within the United States Department of Agriculture. Although the agency is now known as the Rural Housing Service, this brief, like the opinions below, will refer to the agency by its original name.

when certain conditions are met. The legislation also prohibits the FmHA from accepting any prepayment that it otherwise may have required any owner to make unless those conditions are met. The restrictions imposed by the legislation arguably have frustrated the FmHA's ultimate goal of stimulating the growth of all types of housing in rural America to the detriment of both owners and tenants. For obvious reasons, however, petitioners focus on the legislation's impact upon their own individual situations.

I. Statement of Facts[2]

A. The Section 515 Program

Beginning in the 1960s, Congress established several programs encouraging private citizens to construct, own, and manage federally assisted affordable housing units. *See* Belden & Wiener, HOUSING IN RURAL AMERICA 114 (1999). The Section 515 program at issue here was one such program. Section 515 of the Housing Act of 1949 (codified at 42 U.S.C. § 1485), added to the Act in 1962, authorized the FmHA to enter into contracts with private owners to make loans for the purpose of developing housing for low- and moderate-income and elderly tenants in rural areas.[3]

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2 The facts set forth herein are based primarily on the well pleaded allegations of petitioners' pleadings, which must be accepted as true for the purpose of this appeal. *See Warth v. Selden*, 422 U.S. 490, 501 (1975) (holding that in ruling on a motion to dismiss, both the trial court and reviewing courts must accept as true all allegations in the complaint and must construe the complaint in favor of the complaining party).

3 Rural housing programs under the Housing Act of 1949 initially consisted of public housing projects that were developed and operated by local housing authorities. *See* S. Rep. No. 84, 81st Cong., 1st Sess. (1949), 1949 U.S.C.C.A.N. 1550, 1566. By contrast, the Section 515 program and other contemporaneous housing programs were "private sector subsidy programs . . . that sought to involve private developers, both profit-motivated and nonprofit, in the production of rental housing." Belden & Wiener at 114. Initially, only nonprofit borrowers could obtain direct government loans, while for-profit owners could obtain insured non-subsidized loans. *Id.* The complexion of the program changed in 1972

The terms of each owner's contract with the FmHA were set forth in three documents: a loan agreement, a mortgage, and a promissory note. App. 165-81.[4] Owners retained title to their properties while in the program, but were bound to various "regulatory covenants" set forth in the loan agreement. Owners were required to accept only eligible persons as tenants, to charge no higher rents than those permitted by FmHA, to maintain cash reserves, and to comply with certain regulations not inconsistent with the terms of their contracts. App. 169-73, 177, 181. These regulatory covenants remained in force only during the pendency of the loan obligations, and thus would expire upon the loan's maturity date or upon such date as a prepayment might be made. App. 170, 176.[5]

Chief among the program's restrictions was a "return on investment" limitation. Under this provision, the only profit that an owner could earn while in the program was a maximum of eight percent of its "initial investment," *i.e.*, its down payment. App. 170. For example, an owner who made a $91,237 down payment on a project with a $1,238,000 mortgage would earn only a maximum of $7,299 per year so long as it remained in the program. *Id.* This maximum return remained the same regardless of how much equity

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when the agency also made subsidized loans available to for-profit owners. *Id.* at 116. It was after this policy shift that all of the petitioners in this action entered the program. App. 114-20, 140-42.

[4] Petitioners have moved to dispense with the filing of a joint appendix in this case. Accordingly, references herein are to the appendix filed with the petition for writ of certiorari.

[5] The parties' contracts described themselves as "contractually binding" and could be changed only by written agreement between the parties (a common provision in commercial contracts). App. 173. In addition, the loans were subject only to Section 515 of the Housing Act of 1949 and related regulations, which were specified to encompass only those regulations that were in existence at the time the contracts were executed and those future regulations that were "not inconsistent with the express provisions" of the contracts. App. 165-66, 177, 181.

the owner built up in the property and regardless of how much the property's market value increased over time.[6]

Mortgage loans under the program had terms of up to fifty years.[7] Obviously, none of the petitioners intended to stay in the program and abide by its restrictions for that far into the future, by which time few of them would still be alive. App. 128, 150-51, 158 ("My intent upon prepayment was to invest the proceeds . . . to fund my retirement."). Indeed, given the economic realities of the program, remaining in the program for fifty years would prove to be a "horrendous long term investment." *See Grass Valley v. United States*, 51 Fed. Cl. 436, 442 (Fed. Cl. 2002).[8]

Thus, petitioners secured a contractual "termination option" – the right to free themselves from the regulatory covenants by prepaying their loans at a time of their own

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[6] A simple example illustrates the increasing severity of this limitation as time passes. Suppose the owner described above entered into the program in 1979. *See id.* Assuming that after twenty years, by 1999, the owner had built up $1,000,000 of equity in the property and the market value of the property as a conventional apartment complex had risen to $2,000,000, the owner still would receive at most $7,299 per year, which by that time would amount to only 0.73% of its equity and only 0.36% of the property's fair market value. *See* Declaration of G. Morosani ¶26 (in trial court docket in *Grass Valley*, No. 98-726C). Thus, so long as owners remained in the program, their return was similar to that of an annuity. Unlike an annuity, however, investment in the Section 515 program required owners to take on the additional burden and expense of developing and operating a housing project.

[7] While certain petitioners held mortgages with fifty-year terms (App. 165, 176, 178), other mortgages under the program had terms of forty years. For simplicity, this brief will refer to the maximum fifty-year term.

[8] Certain tax benefits initially were available under the program, but those benefits ran out as each project's depreciation schedule expired. *See* 125 Cong. Rec. 18204 (1979) ("The tax advantage in this type of project looks toward a maximum term of about 10 years."); H.R. Rep. No. 100-122(l), 100th Cong., 1st Sess. at 53 (1987), 1987 U.S.C.C.A.N. at 3369 (noting that "the exhaustion of many tax benefits available to Section 515 participants was 'driving owners to prepay or refinance their FmHA loans'").

choosing, thereby terminating their participation in the program. *See* App. 112, 137. As with many commercial real estate mortgages, the promissory notes that petitioners signed included a prepayment clause, which provided that:

> Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower. (App. 176).[9]

The terms of this clause were incorporated into contemporaneous FmHA regulations. 7 C.F.R. § 1822.95(c) (1978). Other regulations, in existence when petitioners entered into their contracts and later promulgated, detailed the procedures that the parties were required to follow in submitting and processing prepayment requests. Among other things, owners were subject to a waiting period and were permitted to prepay only if the agency determined that they were able to obtain adequate commercial financing. *See, e.g.*, 7 C.F.R. § 1965.90 (1983); 7 C.F.R. § 1965 Ex. E (1989); 7 C.F.R. § 1965.211 (1993). If all applicable requirements were met, the agency was required to approve the request, execute the necessary releases, and return the security (*i.e.*, the property) to the owner. 7 C.F.R. § 1866.2 (1978).

Because the regulatory covenants imposed by the program remained in effect only "[s]o long as the loan obligations remain[ed] unsatisfied," *see* App. 170, the prepayment clause served as the vehicle for owners to exercise their right to leave the program and be freed of those covenants. *See* Belden & Wiener at 115 ("Where prepayment occurred, not only was the [FmHA] financing retired, but borrowers were released from enforceable agreements in the Section 515 notes or security instruments

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9 Congress vested the FmHA with the authority to draft the terms of its agreements with owners. 42 U.S.C. § 1472(b)(4) (providing that the loan instrument "shall . . . be in such form and contain such covenants as the Secretary shall prescribe . . . ."). Thus, the FmHA included the prepayment clause in the promissory notes pursuant to the express authority delegated to it by Congress.

that enabled [FmHA] to control the use of the housing"). Upon exercising their termination option, owners could realize the economic potential of their properties by either raising their rents to the rates that the market would bear or selling the properties based on their fair market value as conventional rental properties. App. 112-13, 138.

The termination option was a critical component of the Section 515 program from the perspectives of both the owners and the FmHA. None of the petitioners would have signed its contract absent the right to prepay and leave the program at some time before the expiration of its mortgage term.[10] App. 128, 150; *see also Cienega Gardens v. United States*, 38 Fed. Cl. 64, 75 (1997) (finding that, under parallel HUD housing program, prepayment served as one of the "primary incentives," an "essential aspect" of the program, and an "enticement" without which the owners would not have entered into the program), *rev'd on other grounds*, 162 F.3d 1123 (Fed. Cir. 1998). By the same token, from the government's perspective, the ability of owners to prepay and ultimately use their properties as market-rate investments served as a chief inducement to recruit private parties to enter into the program as originally created. *Id;* Belden & Wiener at 122 (noting that the Section 515 program was "predicated on the assumption that private, profit-motivated owners could be enticed to build, own and operate low-income rental housing" and that "prepayment is wholly consistent" with this strategy). Thus, both the

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10 Petitioners did not, as the courts below assumed, invest in the Section 515 program for the purpose of obtaining a low-interest rate loan. *See* App. 3, 17, 46. While owners were able to enter into the program with a modest down payment, the stated interest rates on the loans (which were not in fact low, *see, e.g.*, App. 176) provided the owners no direct benefit. This is because the *only* profit owners could receive while in the program was the minimal annual return on investment described above. Although government subsidies helped to produce an effectively low interest rate on the loans, the impact of those subsidies was to permit rents to remain low—a benefit that directly inured not to owners, but to the tenants.

petitioners and the government understood that petitioners entered into the program with specific investment goals that could not be achieved absent the right to be freed from the program's regulatory covenants. *See* App. 123, 128-29.

In fact, the privatization of properties in the Section 515 program—referred to by the FmHA as the "graduation" requirement or policy—was fully consistent with the goals of the program. 7 C.F.R. § 1865.2(c) (1979) (stating that by FmHA's policy, "graduation" by voluntary means is "desirable" and "[b]orrowers should by inspired to graduate as a mark of success in their financial affairs"). [11] Indeed, every contract contained a provision requiring owners to prepay their loans upon FmHA's demand as soon as commercial financing on similar terms became available. App. 173, 177, 180; 42 U.S.C. § 1472(b)(3) (requiring all section 515 loans instruments to contain this provision); 7 C.F.R. § 1865.2(c) (1979) ("When voluntary graduation by refinancing cannot be accomplished, there is a legal basis for enforcing the refinancing provisions . . . ."); Belden & Wiener at 114-15. The monies received through prepayment or "graduation" could then be used to finance additional affordable housing under the program, *see* 42 Op. Att'y Gen. 417, 419 (Dec. 29, 1969), which could be constructed to better accommodate then-current needs in each rural community.

B. Subsequent Legislation

As time passed, many owners began to exercise their termination option, prepaying their loans to realize the investment returns to which their contracts entitled them.

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[11] By "graduating" loans from the government as lender to lenders in the private sector, the Section 515 program would achieve its ultimate goal of developing both affordable and conventional rental housing in rural America. *See* Declaration of D. Greenwalt, ¶¶7-9 (in trial court docket in *Grass Valley*, No. 98-726C); *see also* Belden & Wiener, *supra*, at 114 (explaining that the Section 515 program "was intended to stimulate rental housing within markets and for populations not normally served by conventional lenders").

See H.R. Rep. No. 96-154, 96th Cong., 1st Sess. at 43 (1979), 1979 U.S.C.C.A.N. at 2359. The FmHA maintained that it was obligated to accept such prepayments despite concern that doing so would reduce the supply of affordable housing. *Id.* (noting that FmHA "believes it must honor requests to prepay or refinance these loans").[12]

1. *Early Congressional Attempts to Restrict the Agency's Acceptance of Prepayment Requests*

To reduce this potential loss of housing, Congress initially responded by passing a statute in 1979 that specifically prohibited the FmHA from accepting certain prepayments of Section 515 loans. Pub. L. No. 96-153, § 503, 93 Stat. 1134 (1979). During the debates over the 1979 legislation, however, some in Congress "argued that owners' property rights were paramount - that retroactivity was a breach of contract and unconstitutional." Belden & Wiener at 117. In response to the political uproar caused by this repudiation of the owners' rights, Congress repealed the statute in 1980 and restored the contractual termination option for loans issued prior to 1979. The 1980 legislation also required new owners to agree to operate their properties as low-income housing for a minimum of 15 or 20 years. Pub. L. No. 96-399, § 514, 94 Stat. 1671 (1980).[13]

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[12] The FmHA informed Congress in 1979 that it had "acted without sufficient foresight in 1972 when it authorized provision of subsidized loans to limited-profit sponsors." Belden & Wiener at 118. However, given the agency's decision to encourage for-profit owners to enter into the Section 515 program, while permitting and even compelling them to pay off their loans and privatize the housing, the increasing number of owners exercising their termination option was a natural progression of the program. *Id.* at 116-17 (noting that the agency "opened the front door to limited-profit borrowers without closing the back door").

[13] This change in the governing law is the basis for the two classes of plaintiffs in the original actions below - owners with claims based on pre-1979 contracts, whose original termination rights were restored by the 1980 legislation, and owners with claims based on post-1979 contracts, whose termination rights have always been exercisable only after a

After repeal of the 1979 legislation, prepayments by owners under pre-1979 contracts resumed. FmHA accepted prepayments of pre-1979 loans, as required by the contracts, for the ensuing six years. Then, on October 18, 1986, Congress imposed a moratorium prohibiting, with limited exceptions, the use of appropriated funds to process applications for prepayments under either pre- or post-1979 contracts. Originally scheduled to expire in mid-1987, this moratorium was twice extended through March 15, 1988. *See* 42 U.S.C. § 1472 note.

2. *The 1988 Legislation: ELIHPA*

Before the last moratorium expired, on February 5, 1988, Congress enacted the Emergency Low Income Housing Preservation Act, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988), *codified as amended at* 42 U.S.C. § 1472(c) ("ELIHPA") (App. 71-81). Like the 1979 legislation, ELIHPA was designed to curb the loss of affordable housing that was resulting from prepayment.[14] To reach this goal, Congress devised a new scheme for the FmHA to apply in determining whether to grant owner requests to prepay. Whereas the owners' contracts and contemporaneous regulations obligated the FmHA to accept prepayment requests made by owners "at any time at [their] option," ELIHPA limited the circumstances under which the agency was authorized to "accept" such requests. Consistent with

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minimum of 15 or 20 years. Petitioners are all "pre-1979" owners, due to the fact that ELIHPA addressed only pre-1979 contracts and, as a result, only the pre-1979 claims were dismissed by the lower courts as untimely.

[14] ELIHPA was addressed not only to rural housing under the Section 515 program, but also to urban housing under sections 221 and 236 of the National Housing Act, which comes under the jurisdiction of the Department of Housing and Urban Development ("HUD"). The statute created similar changes for both FmHA and HUD housing. In both cases, ELIHPA authorized the relevant agency to accept prepayment requests where, among other things, it could make a determination that the housing was no longer needed or that tenants would not be displaced. *Compare* ELIHPA § 225 *with* ELIHPA § 241.

its goal of preserving only needed affordable housing, however, Congress did not prevent the FmHA from accepting prepayment and releasing an owner from the regulatory covenants when it determined that it no longer needed the housing.

The new scheme under ELIHPA involves a multi-step process for the agency to follow in making a decision on a prepayment request. *First*, the FmHA is required, "[b]efore accepting an offer to prepay," to attempt to persuade the owner to give up its termination option and keep its property in the program for at least an additional twenty years in exchange for certain "incentives." 42 U.S.C. § 1472(c)(4)(A) (App. 74, 83). *Second*, if an owner will not surrender its termination option and agree to extend the low-income use of the property, ELIHPA compels the owner, before exercising that option, to offer the property for sale to any qualified nonprofit organization or public agency for a six month period. *Id.* § 1472(c)(5) (App. 75-55, 84-87). A buyer can be "qualified" by the FmHA only if it agrees to maintain the low-income use of the property, and no sale can be completed unless the agency approves the purchase price. *Id.*[15] *Third*, if an owner is unwilling either to extend its participation in the program or subject itself to the forced-sale process, the agency can accept the owner's prepayment request (and thereby release the owner from the regulatory covenants) only if the owner agrees to maintain the low-income rental rates until the current tenants voluntarily move out. *Id.* § 1472(c)(5)(G)(ii)(I) (App. 89).

Finally, ELIHPA provides one exception that, while narrow, is key to the outcome of this matter. If the FmHA determines that there is no longer a need for affordable housing in the area where the subject property is located,

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[15] Although a hapless owner theoretically could prepay at the end of this "forced-sale" period if no "qualified" buyer emerges, the owner first has to gamble that its property will not be snatched away at a price not determined on the open market. App. 131.

and that housing opportunities for minorities will not be adversely affected, the agency must accept the prepayment request. *Id.* § 1472(c)(5)(G)(ii) (App. 89). Thus, the statute does not in all cases prohibit withdrawal from the program. Instead, if the statutory conditions may be satisfied when the request is made, the agency must accept the owner's prepayment request without restriction, thereby freeing the owner from the covenants set forth in the loan agreement.

ELIHPA also gave owners reason to believe that these restrictions on the FmHA's authority to accept prepayment requests were only temporary in nature. App. 124-26, 146-48. Congress entitled the statute an "emergency" Act and specifically found that, before a permanent solution could be devised, a major review of alternative responses to the threatened loss of low-income housing was required. *See* ELIHPA § 202(a)(9),(10) (App. 71-73, 124). The measures set forth in the statute were therefore described as "interim measures" to be applied by the agency "until the Congress [could] act on recommendations that [would] emerge from this review." *Id.* Certain petitioners were also led "to believe that permanent legal and/or regulatory changes currently under review would be made which would remove or significantly liberalize the temporary prepayment restrictions." App. 130. Congress thus advised any owner who might have been following the legislation to await the government's final word on the matter.[16]

3. The 1992 Legislation and its Implementing Regulations

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[16] The 1988 Legislation specifically required the issuance of "final regulations" to carry out its "interim" requirements. ELIHPA § 241, *codified in relevant part at* 42 U.S.C. § 1472(c)(5)(J) (Add. 28-29); *but see* 42 U.S.C. § 1490n (granting FmHA discretion to issue regulations on an "emergency basis" in lieu of promulgating final regulations). Final regulations were never issued before Congress spoke again. Instead, during the continuing Congressional review of prepayment issues, the FmHA issued a series of interim "emergency basis" regulations. *See* 53 Fed. Reg. 13244, 13245 (April 22, 1988); 55 Fed. Reg. 4985 (Feb. 13, 1990).

The final word came more than four years later, on October 28, 1992, when Congress enacted its final solution to the perceived problem resulting from the ability of Section 515 owners to exercise their termination option. Housing and Community Development Act of 1992, Pub. L. No. 102-550, §§ 2, 712, 106 Stat. 3681, 3841 (1992), *codified in relevant part at* 42 U.S.C. § 1472(c) ("the 1992 legislation"). The 1992 legislation made clear that the restrictions imposed by ELIHPA upon the FmHA's ability to accept prepayments from pre-1979 owners were permanent, and imposed the same restrictions upon the agency with respect to requests made by post-1979 owners.

The FmHA then issued regulations to implement the 1992 legislation. *See* 7 C.F.R. Pt. 1965-E (2000) (App. 91-105). The regulations set forth detailed procedures for the agency to follow in "approving or disapproving prepayments." *Id.* § 1965.215(a) (App. 91). Under the regulations, consistent with the 1988 and 1992 legislation, the agency can "accept" an owner's request to prepay only if, among other things, there is an adequate supply of alternative affordable housing in the area where the property is located. *Id.* § 1965.215(c)(1)(iii),(3)(iii) (App. 92-94). The regulations also set forth procedures for the agency to follow in determining whether this exception has been met and detail nine actions that the agency must take to process its "acceptance of prepayment," including releasing the owner's security instruments. *Id.* § 1965.215(b),(e) (App. 91, 95-103).

C. Application of the Legislation

At some point following the passage of ELIHPA, each of the petitioners determined that the time was ripe – based on their own financial circumstances, their retirement plans, current market conditions, and the housing demand in the area – to exercise their respective termination options. App. 128, 150-51, 158. Many petitioners filed written prepayment requests with the FmHA, which the agency denied based on the continuing need for affordable housing in the subject

market area. *See* App. 129, 157. Other petitioners who decided to prepay were informed by the agency and others that, based on market conditions in the area of their properties, any prepayment request would be denied under the requirements of the new statute, and that submitting a request therefore would be futile. App. 129-30.

Thus, none of the petitioners was able, at the time it desired to exercise its termination option, to satisfy the statutory conditions authorizing the agency to accept its prepayment request. Consequently, petitioners all remain chained to the Section 515 program and subject to its severe income restrictions to this day, and likely will remain so until their fifty-year mortgage terms expire, despite their original intent and present desire to leave the program and regain their freedom from the program's regulatory covenants. App. 129-32, 152-54.

II. Proceedings Below

A. Proceedings Before the Court of Federal Claims

Petitioners filed suit in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491, in 1997 in *Franconia* and 1998 in *Grass Valley*, seeking damages resulting from their inability to terminate their participation in the program upon their intended prepayment dates.[17] App. 128, 131. Petitioners asserted two counts: a contract claim alleging that ELIHPA constituted an anticipatory repudiation of the agency's contractual obligations and a takings claim alleging that the legislation, as applied to their properties, effected

[17] As in any case brought under the Tucker Act, petitioners seek recovery of the damages suffered as a result of the government's actions and are not here seeking to invalidate ELIHPA on any constitutional ground. App. 112; *see Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993). Petitioners seek damages for being compelled to remain in the program for their full mortgage terms and thus will calculate their damages based on the period of time after they desired to leave the program and were prevented from doing so by the agency. App. 131.

takings of their real property interests.[18] App. 112, 129-32. All petitioners filed suit within six years after the date that they desired to leave the program.

The Court of Federal Claims issued its decision in *Franconia* on May 6, 1999, granting the government's motion to dismiss petitioners' contract claims on limitations grounds. The court held that ELIHPA constituted an immediate breach of petitioners' contracts and that their contract claims accrued on the date that the agency issued regulations implementing the statute. App. 28-29. To reach this conclusion, the court determined that the prepayment clause of petitioners' contracts imposed no duty of performance on the government whatsoever:

> A careful reading of this clause reveals that no performance by the government is required – it is merely a promise to allow the borrower to prepay at any time during the life of the loan.

App. 31; *see also* App. 32 (finding that "there was no performance due by the government under the contract"). The court concluded that the contracts imposed on the government nothing more than a continuing obligation to "keep its promise," and that the contracts therefore were breached when the government ceased keeping its promise by changing the law. *Id.* The court thus rejected petitioners' argument that the statute amounted to only an anticipatory repudiation of the FmHA's contractual obligations. *Id.*

Although the government did not move to dismiss petitioners' takings claims,[19] and although there had been

[18] Although the complaints were filed up to five years ago, to date, no discovery has taken place on any of the petitioners' claims.

[19] The government's decision not to seek dismissal of petitioners' takings claims on limitations grounds was understandable, given its contrary position in related litigation. Any argument by the government that the takings claims of the FmHA owners, like their contract claims, were filed too late because they accrued upon *enactment* of the legislation

no discovery or briefing with respect to those claims, the trial court went on to dismiss petitioners' takings claims *sua sponte*, finding that those claims accrued on the same date as the contract claims. Without any citation to the pleadings, the court characterized plaintiffs' allegations as asserting that a taking occurred when the government "passed the legislation because the mere passing of the legislation, *ipso facto*, deprives plaintiffs of their vested right to prepay." App. 24. Thus, the court deemed petitioners' takings claims to allege solely a "facial" taking of their contractual right to prepay, which would have accrued upon the passage of the legislation (or, as the court held, upon issuance of the implementing regulations). App. 34.[20]

Following *Franconia*, the Court of Federal Claims issued a nearly identical decision on the contract claims of the petitioners in *Grass Valley* on April 12, 2000. The *Grass Valley* court agreed that the only performance due by the government under the prepayment clause was "to keep its promise to *allow* borrowers" to prepay at any time. App. 56; *see also id.* at 55 (rejecting argument that the contracts obligated the government "to accept prepayment"). However, unlike the *Franconia* court, the *Grass Valley* court dismissed only those claims on which the government had moved, *i.e.*, petitioners' contract claims.

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would have been inconsistent with its argument that the takings claims of HUD owners were premature because they accrued only upon the agency's *application* of the legislation. *See, e.g., Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999).

[20] Petitioners sought reconsideration of the court's opinion on a number of grounds, including the fact that the court had mistakenly assumed that none of the petitioners had requested to prepay. As an example, petitioners submitted a declaration from petitioner Phoebe Perri in which she detailed her attempts to prepay and the FmHA's denial of her request. App. 157-58. Because there has been no discovery on the subject claims, Ms. Perri's declaration stands as the only evidence in the record on appeal concerning petitioners' efforts to prepay. The court acknowledged that it had misstated the facts, but denied the motion. *See* 44 Fed. Cl. 315 (1999).

B. Proceedings Before the Federal Circuit

On appeal in *Franconia*, the Federal Circuit affirmed, holding that ELIHPA immediately "took away" and "eliminated" petitioners' contract rights. App. 10, 14. The court thus held that petitioners' contract claims accrued on the day that the statute was enacted (rather than when the regulations were issued, as the trial court held) and became time-barred in February 1994, six years after ELIHPA's enactment.[21] App. 10. The Federal Circuit adopted the trial court's reasoning that "the note's prepayment provision did not require any performance on the part of the government" and that the government thus had no more than an intransitive duty "to continue to allow borrowers the unfettered right to prepay their loans at any time." *Id.*

The court then applied a similar analysis to petitioners' takings claims. The court defined petitioners' takings claims —contrary to their allegations—as asserting solely a taking of their "unfettered right to prepay" (*id.* at 14), rather than a regulatory taking of their real property interests. By characterizing petitioners' claims in this manner, the court proceeded to the conclusion that this right "was eliminated by the government with the passage of ELIHPA" and that petitioners' takings claims thus accrued upon enactment of the statute. *Id.* In so holding, the court made no mention of the fact that the statute vests the agency with authority to grant prepayment requests in certain circumstances.[22]

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[21] The question whether, under the lower court's reasoning, the limitations period commences on the date that ELIHPA was enacted or the date that its implementing regulations were promulgated is not at issue here, since petitioners filed suit more than six years after either date. Further, under the facts presented here, the anticipatory repudiation doctrine, described below, would apply to either event.

[22] Petitioners sought rehearing in *Franconia*, based in part on the Federal Circuit's prior opinion in *Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999), where it held that the takings claims of HUD owners accrued not upon the enactment of ELIHPA, but at the later date when the agency

Following the issuance of the Federal Circuit's decision in *Franconia*, but before it denied rehearing in that case, the court issued a *per curium* decision in *Grass Valley* in which it affirmed without comment the dismissal of petitioners' contract claims on statute of limitations grounds. App. 15.

SUMMARY OF ARGUMENT

These cases come to this Court as the result of the Federal Circuit's determination that petitioners' claims are time-barred, a conclusion that it reached in total disregard of two of the most well-established precepts of law pertaining to actions for damages against the United States: (1) that the government is bound by the law governing contracts between private citizens when it enters into contracts, and (2) that a regulatory takings claim based on the application of a statute that allows for an agency decision on the scope of permissible use of the property in question is not ripe for judicial review until the agency renders such a decision. By ignoring these bedrock principles, the Federal Circuit permitted the government to obtain dismissal of petitioners' claims on statute of limitations grounds, depriving them of a hearing on the merits. The proper application of the law, however, demonstrates that petitioners' claims were filed in a timely manner.

Accrual of Petitioners' Contract Claims. There is no question that if this were a contract dispute between two private parties, petitioners' claims would be deemed timely and heard on the merits. Under the doctrine of anticipatory repudiation, petitioners' contract claims did not accrue upon the enactment of the legislation by Congress, but rather when the agency, applying the new restrictions set forth in the statute, breached its contractual obligation by refusing to accept petitioners' prepayment requests. This comports

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rendered a final decision on a prepayment request from each owner. The court denied the petition for rehearing. App. 70.

with the precedent of this Court recognizing the distinction between the *enactment* of legislation by Congress as a repudiation of the government's contractual obligations and the *application* of that law by the relevant agency as an actual breach. This Court should hold the government accountable to standard contract law principles and hold that ELIHPA amounted only to an anticipatory repudiation of the government's contract obligations, which did not result in the automatic triggering of the statute of limitations.

Contrary to these principles, the Federal Circuit presumed that the legislation "eliminated" petitioners' contract rights, thus causing the statute of limitations to commence to run immediately. Even a cursory review of the statute reveals, however, that Congress did not even attempt to "eliminate" petitioners' termination option. Rather, the FmHA retains authority to accept prepayment requests in certain circumstances, thereby releasing Section 515 owners from the regulatory covenants set forth in their agreements. By only restricting the agency's ability to accept owners' requests to exercise their termination option, Congress avoided larger constitutional problems it would have encountered had it completely eliminated petitioners' rights under their contracts with the government.

The Federal Circuit avoided this dispositive feature of the statute by devising a fictional account of the FmHA's duty of performance under the contracts. The court interpreted the government's obligation as encompassing only a duty to "continue to allow" petitioners to prepay, rather than as the performance of a contractual obligation to *accept* prepayments when tendered. The court thus concluded that petitioners' contract claims accrued when the government, by passing ELIHPA, ceased continuing to "allow" prepayments. However, the parties' contracts, the governing statutes and regulations, and the common law of contracts all make clear that the government was obligated not merely to *allow* owners to prepay, but to *accept*

prepayment requests submitted by owners. Indeed, absent such a reciprocal duty of acceptance, the contracts would be rendered illusory. The lower court's attempt to absolve the government from its contract obligations, in order to justify its conclusion that any breach occurred automatically upon enactment of the statute, should not be permitted to stand.

Accrual of Petitioners' Takings Claims. This Court has held time and again that a regulatory takings claim challenging a statute that holds open the possibility that the property owner may be permitted to use its property as desired is not ripe for judicial review until the agency charged with implementing the statute renders a decision on the permitted use of the property. By its terms, ELIHPA grants the FmHA the authority to accept prepayment requests and thereby free owners from the program's regulatory covenants in specified circumstances.

As a result, the statute clearly calls for an "as-applied" takings analysis, rather than the "facial" analysis that the lower courts appeared to adopt. This holds true whether the property right at issue is viewed as a state-created real estate interest, as petitioners pled, or as a contractual right to prepay, as the courts below characterized it. By holding that the statute of limitations on petitioners' takings claims commenced upon enactment of the statute, the Federal Circuit effectively held that petitioners' claims *accrued* before they became *ripe* for review. This cannot be the law.

Finally, the Federal Circuit's analysis, if permitted to stand, will spawn judicial inefficiencies and unfairness to litigants. In order to maintain logical and consistent rules governing the accrual of claims against the government, this Court should not view petitioners' contract and takings claims in isolation from one another. The Court should hold that because the statute leaves open the possibility that owners will be freed from the regulatory covenants upon their request to leave the program, neither petitioners'

contract claims nor their takings claims accrued immediately upon the enactment of ELIHPA.

ARGUMENT

I. The Federal Circuit Exempted The Government From Standard Contract Law Principles By Holding That Petitioners' Contract Claims Accrued For Purposes Of 28 U.S.C. § 2501 Immediately Upon Enactment Of The 1988 Legislation.

"When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *See Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000) ("*Mobil*") (internal quotations and citations omitted); *accord United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996) ("*Winstar*"); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943) ("The United States does business on business terms."); *Perry v. United States*, 294 U.S. 330, 352 (1935); *Lynch v. United States*, 292 U.S. 571, 579 (1934); *Cooke v. United States*, 91 U.S. 389, 398 (1875) (when the United States "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there").[23]

As this Court held in *Winstar*, holding the government accountable to such standards is essential to protect "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." 518 U.S. at 883. By contrast, a rule "expanding the Government's opportunities for contractual abrogation" would have "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *Id.* at 884. The

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[23] Government contracts are controlled by the federal common law of contracts, *see United States v. Allegheny County*, 322 U.S. 174, 183 (1944), which, in turn, is informed by "the principles of general contract law," *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947).

Federal Circuit's decision in this case creates that very danger, in that it rejects contract claims against the government as time-barred when indistinguishable claims brought against a private party would be deemed timely.

A. The 1988 Legislation Constituted An Anticipatory Repudiation Of Petitioners' Termination Option, Which Did Not Start The Statute Of Limitations.

1. *The Law Of Anticipatory Repudiation*

One basic principle of contract law is the doctrine of anticipatory repudiation, set forth in the Restatement (Second) of Contracts § 250 ("Restatement") (1981). *See Mobil*, 530 U.S. at 608.[24] The Restatement defines a repudiation as a "statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach." Restatement § 250. An anticipatory repudiation occurs where one party to a contract impairs the other party's expectation of performance before the time for performance arrives. [25] *Id.* at 271. Such a statement of

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[24] The doctrine of anticipatory repudiation can be traced back to the landmark case of *Horchster v. De la Tour*, 118 Eng. Rep. 922 (Q.B. 1853). *See Roehm v. Horst*, 178 U.S. 1 (1900); *Dingley v. Olger*, 117 U.S. 490 (1886); *Dow Chemical Company v. United States*, 226 F.3d 1334, 1344 (Fed. Cir. 2000); 17A Am. Jur. 2d, Contracts § 448 (1990); Corbin, CONTRACTS §§ 959, 1053 (1964) ("Corbin"); Jaeger, WILLISTON ON CONTRACTS §§ 824, 1300 et seq., 2027B (3d ed. 1968) ('Williston"); Murray, CONTRACTS § 109 (3d ed. 1990) ("Murray"); Restatement (First) of Contracts § 318 (1932); Rowley, *A Brief History Of Anticipatory Repudiation In American Contract Law*, 69 U. CINN. L. REV. 565 (2001). Applications of the doctrine can arise in "myriad situations." Murray, § 109(A); *see also* Corbin, § 1053 ("It is not at all uncommon for a contractor to repudiate the contract before the time for performance arrives.").

[25] The doctrine thus recognizes that a breach does not occur until the time for performance arrives and the obligor fails to perform. *See* Restatement § 250, illus. 1; Williston, § 1300 ("One who contracts to do a certain thing on a certain contingency or at a certain time does not and indeed cannot break that promise unless the contingency happens or the

prospective non-performance can consist of either a statement by the obligor of its intention not to perform under any circumstances or a statement of "intention not to perform except on conditions going beyond the contract." Restatement § 250, cmt. b; Murray, § 109(C).[26]

The fact that an action amounts to a repudiation rather than a breach has important consequences for the statute of limitations. In response to an anticipatory repudiation, the obligee may either sue immediately or await the time that the obligor's performance under the contract comes due. Williston, § 1337; *Roehm*, 178 U.S. at 10 (finding it "reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done"). If the obligee elects to wait, the statute of limitations on a claim for breach does not commence to run until the time for performance arrives and the obligor actually fails to perform. *Kinsey v. United States*, 852 F.2d 556, 558 (Fed. Cir. 1988); *Plaintiffs in Winstar-Related Cases v. United States*, 37 Fed. Cl. 174, 183 (1997); Corman, LIMITATION OF ACTIONS § 7.2.1 (1991).

By granting the non-repudiating party these options, the doctrine serves an important policy interest. Allowing the obligee to defer suit until the time for performance arrives provides the obligor an opportunity to retract its wrongful repudiation and perform as promised, thereby eliminating the need for a lawsuit. Murray, § 109(E)(5); Williston, § 2027B. As Professor Corbin explains:

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time arrives."); Burton, CONTRACTUAL GOOD FAITH § 6.3.1 (1995) (while a breach impairs a party's interest in "present performance" under the contract, a repudiation impairs the interest in "future performance").

[26] *See also Alaska Pulp v. United States*, 48 Fed. Cl. 655, 659 (2001) ("The archetypal repudiation, therefore, occurs when one party to a contract attempts to unilaterally alter the contract or to condition his performance on terms that were not part of the bargain.").

> The plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and he would be so penalized if the statutory period of limitation is held to begin to run against him immediately. (Corbin, § 989).

2. *The 1988 Legislation Constitutes An Anticipatory Repudiation Of The FmHA's Contract Obligations.*

This Court's decision in *Mobil* makes clear how the doctrine of anticipatory repudiation applies in the context of legislation passed by Congress that alters an agency's contract obligations.[27] There, the government was obligated under contracts with oil companies to approve oil exploration plans submitted by the companies, if proper, within thirty days after submission. 530 U.S. at 609-10. Subsequent legislation placed conditions on that approval, making it impossible for the government to approve plans submitted by the companies within the promised time frame. *Id.* at 611-12; *see also Conoco Inc. v. United States*, 35 Fed. Cl. 309, 318 (1996).

The trial court found, based on these facts, that the legislation constituted an "anticipatory repudiation" of the contracts. *Conoco, Inc.*, 35 Fed. Cl. at 327. This Court agreed, holding that "the Government's communication of its intent to commit [a] breach amounted to a repudiation of the contracts."[28] *Mobil*, 530 U.S. at 621; *see also id.* at 619 (noting that "if legislation passed by Congress and signed by the

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[27] Although *Mobil* was decided after this case was fully briefed to the Federal Circuit in *Franconia*, petitioners notified the court of the decision pursuant to Fed. R. App. P. 28(j). The Federal Circuit, however, failed to discuss or reference the case in its decision.

[28] A "repudiation" as discussed by the Court is no different from an "anticipatory repudiation." *See* Restatement § 250 ("repudiation" defined as a "statement . . . that the obligor will commit a breach"), *quoted in Mobil*, 530 U.S. at 608; *id.* illus. 1; Black's Law Dictionary 1306 (7th ed. 1999) ("repudiation" defined as "words or actions that indicate an intention not to perform the contract in the future; a threatened breach of contract").

President is not a 'statement by the obligor,' it is difficult to imagine what would constitute such a statement"). Thus, the legislation did not constitute an immediate failure to perform under the contracts, but rather a statement of the government's intent to breach the contracts in the future – a classic anticipatory repudiation. This was true even though the statute left no doubt that the government would not comply with its contractual obligations. *Id.* at 611-12, 618.[29]

Courts addressing the anticipatory repudiation doctrine in cases involving the question whether a legislative act immediately triggers the statute of limitations similarly have held that the *enactment* of the legislation at issue amounts to an anticipatory repudiation of affected contracts. These courts also have held that the limitations period does not commence to run until the later *implementation* of that legislation by the contracting agency results in an actual breach. *See Bank of America v. United States*, 51 Fed. Cl. 500, 506, 510 (2002) (claim accrued upon agency's "application" of statute, which gave plaintiffs "full notice" of breach); *Plaintiffs in Winstar-Related Cases*, 37 Fed. Cl. at 183 (applying *Winstar* to hold that "FIRREA was essentially a legally binding forecast of a future breach" and thus "falls well within the definition of an anticipatory repudiation").[30]

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[29] The Court's conclusion that the legislation constituted a repudiation of the contracts at issue, as opposed to a full breach, was key to its holding that the remedy of restitution was available to the contractors. *Id.* at 608.

[30] The Federal Circuit's decision in *Alder Terrace v. United States*, 161 F.3d 1372 (Fed. Cir. 1998) is not to the contrary. There, the court held that an HUD owner's claim accrued upon its "20-year anniversary" – the date when the owner first became eligible under its contract to prepay – which in that case came after both the date of ELIHPA's enactment *and* the date on which the agency denied the owner's request to prepay. *Id.* at 1375, 1379. Because the owner filed suit more than six years after HUD's denial, its claim would have been untimely even under the doctrine of anticipatory repudiation. As a result, the owner did not rely on the doctrine and the court did not address it. Any interpretation of *Alder Terrace* as holding that the owner's claims accrued immediately upon the

Other cases have also recognized this distinction between legislation as a "repudiation" and agency enforcement as a "breach." *See Schism v. United States*, 239 F.3d 1280, 1290 (Fed. Cir.), *vacated on reh'g en banc*, 252 F.3d 1354 (2001); *Far West Fed. Bank v. Office of Thrift Supervision*, 119 F.3d 1358, 1365 (9th Cir. 1997) (quoting Restatement § 253); *Alaska Pulp Corp.*, 48 Fed. Cl. at 659 (statute was statement of "prospective nonperformance" and agency implementation resulted in breach); *Conoco, Inc.*, 35 Fed. Cl. at 327; *see also Stone Forrest Indus., Inc. v. United States*, 973 F.2d 1548, 1552 (Fed. Cir. 1993). Underlying these cases is the principle that Congress does not breach contracts by passing laws; rather, a breach occurs when the agency with whom the plaintiff contracted takes some action in derogation of the contract based on the strictures of the law.

The Federal Circuit's holding that ELIHPA constituted an immediate breach of petitioners' contracts cannot be squared with this precedent. Just as the contracts in *Mobil* obligated the government to approve proper exploration plans submitted by the contractors, the contracts here obligated the FmHA to accept requests by owners to terminate their participation in the program. And just as the legislation in *Mobil* announced that the government would not approve exploration plans according to the terms of the contracts, ELIHPA announced that the government would not approve prepayment requests in accordance with petitioners' contracts. In both cases, the government's legislative act of placing extra-contractual conditions on its future obligations amounted to a repudiation of the contracts, which ripened into an actual breach only when the time for performance by the agency arrived.[31]

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enactment of ELIHPA would be directly at odds, not only with the facts of the case itself, but also with *Mobil* and the other decisions cited above applying the doctrine of anticipatory repudiation.

[31] This case thus presents a repudiation consisting of a statement by the obligor that it will perform its future obligations only "on conditions that

Mobil and its progeny thus dispel any notion that legislation cannot fit the bill of an anticipatory repudiation. *See* 530 U.S. at 619. It is also worth noting that a legislative repudiation, like any other repudiation, can be retracted. *See id.* at 621 (noting that the government did not argue that it "retracted" its legislative repudiation). In fact, the government had earlier repudiated petitioners' contracts by passing a law in 1979 that restricted the ability of the FmHA to accept prepayment, but then retracted that repudiation by passing another law in 1980 that restored the agency's authority. *See supra* at 9; *see also* Housing Opportunity Program Extension Act of 1996, Pub. L. 104-120, § 2, 110 Stat. 834 (1996) (restoring prepayment right of owners under HUD housing program).

Because ELIHPA constituted an anticipatory repudiation of the FmHA's contractual obligations, petitioners had the option of either suing immediately upon the repudiation or waiting until the time for performance arrived. Petitioners opted to wait, providing the agency with the opportunity to perform by releasing petitioners from the program's regulatory covenants upon their request. Indeed, given the fact that ELIHPA continued to compel the agency to perform this obligation in certain circumstances, it was certainly reasonable for petitioners to defer suit until they decided to exercise their termination option, submitted a request to the agency, and obtained a decision. Under the doctrine of anticipatory repudiation, petitioners cannot be penalized for

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go beyond the contract." *See* Restatement § 250 cmt. b; Murray, § 109(C); App. 126-28. In such a case—no less than in the case where the obligor states that it will not perform under any circumstances—the doctrine of anticipatory repudiation provides the obligor an opportunity to retract its repudiation. Moreover, the possibility also remains in such a case that the newly imposed conditions will be met when the time for performance arrives, causing the obligor to perform as originally promised. *See Mobil*, 530 U.S. at 621-22 (obligee "'does not change the effect of a repudiation by urging the repudiator to perform in spite of his repudiation'") (quoting Restatement § 257); *accord Alaska Pulp Corp.*, 48 Fed. Cl. at 668.

making this choice. *See* Corbin, § 989. As petitioners all filed suit within six years after their intended prepayment dates, their claims are timely under 28 U.S.C. § 2501.[32]

B. The Federal Circuit Created Contract Rules Applicable Only To The Government.

1. *The Law Of Anticipatory Repudiation As Applied To Contractual Options*

If this were a dispute between private parties, there would be no question as to how these principles apply. The law is clear that a party's statement that it will not honor the terms of an option contained in a contract constitutes an anticipatory repudiation, such that the option-holder need not bring suit until after it attempts to exercise the option and the repudiating party fails to perform by accepting the tender. *See Holm v. CalEnergy Co.*, 229 F.3d 1157, 2000 WL 975177 at *1-2 (9th Cir. 2000) (table case); *Hermanowski v. Acton Corp.*, 580 F. Supp. 140, 143 (E.D.N.Y. 1983), *aff'd in relevant part*, 729 F.2d 921 (2d Cir. 1984); *ACE INA Holdings, Inc. v. Kane*, 1999 WL 959812 at *3 (E.D. Pa. 1999) (party's statement that it would not comply with stock option contract was an anticipatory repudiation because "time for performance" had not yet arrived); *Rossi v. Oristian*, 376 N.Y.S.2d 295, 297 (N.Y. App. Div. 1975) (a claim for breach of a stock option contract "which provides that plaintiff might exercise the option at any time, presents a situation where the Statute of Limitations does not commence to run until the person granted the option demands the stock").

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[32] Even if the doctrine of anticipatory repudiation did not apply in this case, the result would be the same. The doctrine permits plaintiffs to sue *before* the time for performance arrives. *See supra at* 23. Here, however, petitioners decided to await the time for performance under their contracts and brought suit only *after* the agency's actual breach. Therefore, petitioners' claims are timely under standard contract law principles even absent the application of the doctrine. The doctrine simply serves to illustrate the fact that because the legislation at issue was anticipatory in nature, it did not, as the court below held, amount to an immediate breach of petitioners' contracts.

This conclusion is mandated by the very nature of a contractual option, which vests the option-holder with the right to choose at which point during the promised period it wishes to exercise the option. A contrary rule allowing the limitations period to commence upon the defendant's repudiation "would permit the defendant to select the date of breach and thus rob the plaintiff of the value of his option." *Hermanowski*, 580 F. Supp. at 143; *see also Fullington v. M. Penn Phillips Co.*, 395 P.2d 124, 125 (Ore. 1964) (the "very privilege" for which an option holder bargains is "the assurance that he will have the entire option period in which to make his decision").

The result should be no different here. Petitioners' contracts granted them the option to terminate their participation in the program at any time that they desired during their fifty-year mortgage terms. As a result, the statute of limitations on petitioners' contract claims did not begin to run until each owner requested to terminate and the government failed to perform by accepting each owner's tender. The Federal Circuit's contrary holding that all Section 515 owners affected by ELIHPA were required to file suit within six years after its enactment, regardless of whether they attempted or even desired to prepay during that window of time, improperly permitted the government, rather than petitioners, to set the date of breach. In granting this power to the government, the court exempted it from standard principles of anticipatory repudiation.

2. *The FmHA's Obligation Under The Contracts Was To "Accept" Prepayment Requests Submitted By Owners.*

The Federal Circuit circumvented the application of the anticipatory repudiation doctrine here by finding that the agency had no duty under the contracts to perform by accepting prepayment requests. App. 10 (holding that "the note's prepayment provision did not require any performance on the part of the government"). Instead, the court held that the FmHA's only duty under the contracts

was to "continue to allow" petitioners to prepay. *Id.*; *see also* App. 8-9 (noting that petitioners' position was "premised upon the proposition that the FmHA's obligation under the loan contracts was to accept prepayment rather than allow prepayment"). The lower court's assessment of the FmHA's duty of performance, however, is contrary to both the terms of the contracts and the applicable statutes and regulations.

Petitioners' contracts, and the consistent regulations incorporated by reference therein, entitled them to prepay and free themselves from the program's regulatory covenants at any time. In particular, the contracts state that prepayments "may *be made* at any time" (emphasis added). This clause necessarily encompasses both an entitlement on the part of owners to submit prepayment requests *and* a reciprocal obligation on the part of the government to accept such requests when made. Any other interpretation would render the contracts illusory, in that absent a government obligation to accept prepayment, the owners' contractual right to prepay would be meaningless. *Mobil*, 530 U.S. at 620 (finding government consideration of plans submitted by contractors to be a "necessary reciprocal obligation" without which the contracts would be rendered "illusory"); *see also Winstar*, 518 U.S. at 921 (Scalia, J., concurring) (government contracts should not be read in a manner that renders government obligations "illusory").

The statutes and regulations governing the Section 515 program confirm that the FmHA's obligation was to accept prepayment requests made by owners and thereupon return the security (*i.e.*, the property) to the owner. ELIHPA and its implementing regulations are addressed to the FmHA's duty to "accept" prepayment. 42 U.S.C. § 1472(c)(4)(A), (5)(A); 7 C.F.R. § 1965.90(b) (1987). The 1979 legislation similarly was directed to the FmHA's "acceptance" of prepayment requests. Pub. L. No. 96-153, § 503(b), 93 Stat. 1134 (1979), *codified at* 42 U.S.C. § 1472(c)(1),(2) (describing when Secretary "may not accept an offer to prepay" and

when Secretary "shall accept such offer").[33] None of these provisions would make any sense unless the government actually had an obligation to "accept" prepayment requests.

Further, cases involving contractual option provisions consistently hold that once an option-holder exercises its option, the other party has a duty to perform by accepting the tender. *Holm*, 2000 WL 975177 at *1 ("obligation" to sell stock arose when option-holder "tendered the option price"); *Saewitz v. Epstein*, 6 F.Supp.2d 151, 157 (N.D.N.Y. 1998) ("the actual exercise of an option contract by the optionee is the performance of a condition precedent to the optionor's duty to perform") (citing 4 Corbin, CONTRACTS § 264 (1951)); *see also Lucente v. IBM Corp.*, 146 F.Supp.2d 298, 309 (S.D.N.Y. 2001) (option-holder "has sole power to decide when (or if) the optionor must perform"). Here, too, the government was obligated to perform by accepting prepayment if and when each owner tendered a request, and then releasing the security held by the government.

By finding that the contracts obligated the government to do no more than simply "continue to allow" owners to prepay, the court was able to hold that the only promise the government made under the contracts was to keep its promise. *See* App. 10; *see also* App. 31. This reasoning, if generally applied, would write the doctrine of anticipatory repudiation out of the law, in that any statement by a party of its intention not to perform under a contract could be converted into a breach of the duty to "keep the promise," so

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[33] Petitioners' contracts incorporate by reference regulations that also illustrate that the government's duty entailed not only an obligation to accept the owner's tender of prepayment, but also to complete a litany of tasks necessary to authorize and process the final payment, release the security, and permit the owner to exit the program. 7 C.F.R. § 1965.90(e) (1983) (outlining procedures for final payment and release); *id.* § 1866.2 (1983) (authorizing County Supervisor to execute the necessary releases to return the security to the borrower); *id.* § 1866.3 (1983) (detailing procedures for the county office to follow in handling final payment and delivering of documents to the borrower).

that the statute of limitations would begin to run immediately when the statement is made. Fortunately, the law of anticipatory repudiation avoids such absurd results by providing that the limitations period commences only when the time for performance arrives and the repudiating party actually fails to perform. *See supra* at 23-24.

Indeed, the notion of a promise to keep one's promise (*i.e.*, a promise not to repudiate) is merely a legal fiction, since no such promise is ever expressly made. *See* Corbin, § 1053 ("A forbearance to repudiate is never specifically promised."); Williston § 1309 ("If the defendant promised to employ the plaintiff upon June 1, the breach must be that he did not do that. A statement in May by the defendant that he is not going to employ the plaintiff upon June 1 can be a breach only of a contract not to make such statements."). Remarkably, the Federal Circuit converted this legal fiction into the government's only duty under the contracts.

* * *

The presumption underlying the government's arguments appears to be the notion that, notwithstanding this Court's repeated admonitions that the government is bound to standard contract law principles when it enters into private contracts, the government is still somehow different. This is the same flawed logic that the government pressed, unsuccessfully, in *Winstar* and *Mobil*. This Court should reverse the decision of the Federal Circuit to hold the government accountable to standard contract law and protect "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." *Winstar*, 518 U.S. at 883.

C. The Federal Circuit Erroneously Held That Congress Retroactively "Eliminated" Petitioners' Contract Rights By Legislative Fiat, Thereby Triggering The Statute Of Limitations.

The Federal Circuit avoided the bedrock principles of contract law set forth above that render petitioners' claims timely by also holding that ELIHPA immediately "took away," "eliminated," and "conclusively abolished a material contract right." App. 10, 12 n.3, 13, 14. Based on this reading of the statute, the court concluded that petitioners' contract claims must have accrued upon its enactment. App. 10. The language of the statute, however, leaves no doubt that Congress specifically refrained from such a retroactive abrogation of the government's own contractual obligations. Instead, Congress restricted the FmHA's ability to perform its future obligation of accepting a prepayment request if and when made, such that a breach of contract claim, if any, would accrue only upon the agency's actual denial of a prepayment request.

1. *Congress Did Not Even Attempt To "Eliminate" Petitioners' Contract Rights.*

An exhaustive review of the provisions of ELIHPA reveals no support for the Federal Circuit's holding that the statute "eliminated the allowance of [unfettered] prepayments" (App. 12 n.3) and thereby triggered the immediate accrual of the statute of limitations. In fact, ELIHPA specifically "allows" prepayment without any restrictions under certain circumstances. Congress clearly envisioned that owners would continue to submit prepayment requests and that the agency would continue to accept such requests in some cases. Indeed, detailed procedures for both the submission of prepayment requests by owners and the acceptance of such requests by the FmHA have existed throughout the Section 515 program's history. *See supra* at 6, 31 n.33. Through ELIHPA, Congress set forth further procedures for the agency to follow in determining whether to accept future prepayment requests.

For example, ELIHPA states that "*before accepting* any offer to prepay," the agency must make efforts to persuade the owner to remain in the program for another twenty

years or more. 42 U.S.C. § 1472(c)(4)(A) (emphasis added) (App. 83). The statute also requires the agency to accept owner requests to prepay when it determines, among other things, that there is no longer a need for affordable housing in the area where the property is located. 42 U.S.C. § 1472(c)(5)(G)(ii) (App. 89). The regulations promulgated under ELIHPA similarly provide that "prepayment can be accepted" where the agency makes this determination. 7 C.F.R. § 1965.215(a),(c) (App. 91-93).

Congress could have undertaken to immediately "eliminate" petitioners' contract rights had it enacted legislation simply prohibiting owners from *submitting* requests to prepay, or prohibiting the FmHA from *accepting* such requests under any circumstances.[34] It did neither. Rather, Congress simply chose to alter the agency's authority to accept future requests by owners to prepay their mortgages. This is precisely what petitioners alleged: that the statute restricted the agency's obligation to permit owners to exercise their termination option. App. 112 (alleging that the legislation repudiated the government's "obligation to permit FmHA contract holders to terminate their contracts at any time at their option").[35] Thus, the

[34] Irrespective of which approach Congress may have chosen, the analysis contained in Section I.A and I.B above makes clear that the statute of limitations would not begin to run until the time for government performance under petitioners' contracts arrives. Thus, even if Congress had altered the conditions under which petitioners could *submit* a prepayment request (as opposed to altering the conditions under which the agency could *accept* such a request), the limitations period would not start unless and until that request was denied, or the petitioner established that, at the time it desired to leave the program, it would have been futile even to submit a prepayment request because the conditions required for agency approval simply did not exist.

[35] *See also* App. 129 ("The Government's repudiation does not constitute a failure to carry out any immediate duty of present performance unless and until the date of Government performance required by each contract arrives, *i.e.*, the date that any FmHA contract holder would have achieved its option of terminating its contract but for the Government's

Federal Circuit's holding that ELIHPA effected an immediate elimination of petitioners' contract rights disregards not only the text of the statute, but also petitioners' allegations.

The Federal Circuit's erroneous holding that ELIHPA eliminated petitioners' contract rights, as opposed to having restricted the agency's authority to accept prepayments, is also contrary to its own prior decision in *Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999). There, the court analyzed the sections of ELIHPA applicable to HUD and another statute passed in 1990.[36] The court concluded that the statutes do not *disallow* owners from prepaying, but rather impose conditions on the agency's ability to *approve* requests to prepay. *Id.* at 1357 (holding that "neither statute denies an owner the ability to prepay its mortgage loan; rather, both statutes provide that an owner may prepay, albeit in accordance with a plan of action approved by the Secretary"). There is no basis for the Federal Circuit to have reached the opposite conclusion in this case.

In sum, ELIHPA does not prohibit owners from requesting to prepay and does not in all instances prohibit the FmHA from accepting those requests. Rather, the possibility always remains under ELIHPA that the right of owners to be freed from the program's regulatory covenants upon prepayment will be achieved. As a result, the statute cannot possibly be understood as "eliminating" petitioners' rights. The Federal Circuit reached the contrary conclusion only by ignoring the terms of the statute. Accordingly, the Federal Circuit's holding that petitioners' contract claims

repudiation."); App. 126-28 (detailing the extra-contractual procedures the FmHA must follow under the 1988 and 1992 legislation in response to an owner's request to exercise its termination option).

[36] As explained above, the provisions of ELIHPA applicable to HUD, like those applicable to the FmHA, continue to authorize prepayment where the agency determines that there is no longer a need for the subject housing. *See supra* at 10 n.14.

accrued immediately upon the enactment of the statute should be reversed.

2. *Congress Avoided Unnecessary Disputes And Constitutional Challenges By Refraining From Retroactively Eliminating Petitioners' Rights.*

Faced with the task of limiting the loss of housing in the Section 515 program, Congress of course had a number of options before it. For example, it could have taken title to the properties through its power of eminent domain, after which the housing could have been operated and managed by the federal government. Congress also could have revoked the authority of the FmHA to consider any prepayment requests in the future, directing that any requests submitted be denied outright. It also might have declared the prepayment language in the owners' contracts null and void, or passed a law making it unlawful for owners even to submit prepayment requests to the agency.

Instead of taking any of these more extreme measures, which would have resulted in the immediate conscription of petitioners' properties or the abolition of their contract rights, Congress chose to set up a scheme that continues to permit owners to submit requests to terminate their participation in the program and authorizes the agency to grant such requests in certain circumstances. In this manner, Congress avoided potential disputes where: (1) the agency no longer needs the housing at the time the owner requests to terminate, or (2) the owner never decides to leave the program for some reason, and thus never submits a request.

By stopping short of eliminating petitioners' contract rights, Congress also avoided certain constitutional challenges. For example, under the circumstances here, an absolute and wholesale destruction of preexisting contract rights likely would have been invalidated as an impermissibly retroactive impairment in violation of either the Takings Clause or substantive due process. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 529 (1998); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-602 (1935).[37] Congress steered clear of such challenges by devising a regime that continues to permit owners to exercise their termination option in some cases. As a result, no owner can establish that its right to be freed from the program's regulatory covenants upon prepayment has been impaired until it attempts to exercise that option and is denied. *Cf. Thetford Properties IV L.P. v. Department of Housing and Urban Dev.*, 907 F.2d 445, 449 (4th Cir. 1990) (holding that owners under HUD housing program could not raise substantive due process challenge to ELIHPA until they complied with prepayment procedures set forth in statute).

Finally, had Congress drafted ELIHPA in a manner that truly "took away and conclusively abolished a material contract right" (App. 14), its actions would have raised deeper concerns about its authority to extinguish the government's own contractual obligations *ipse dixit* by passing legislation. It is important to note, in this regard, that because ELIHPA was targeted at Section 515 owners, that statute did not qualify as a "public and general" act within the protection of the sovereign acts defense.[38]

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[37] While Congress may have some latitude to enact legislation impairing contracts between private parties without running afoul of the Constitution, *see, e.g., Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211 (1986), it is held to a much higher level of scrutiny when it attempts to modify its own contractual obligations. *See* Rotunda & Nowak, TREATISE ON CONSTITUTIONAL LAW § 15.9(a) (3d ed. 1986) (explaining that this Court "has used a higher level of review to legislation that modifies the government's own contractual obligations than it does to federal legislation that alters or regulates private contracts") (citing *Lynch v. United States*, 292 U.S. 571 (1934)).

[38] Petitioners further note that because ELIHPA does not qualify for protection under the sovereign acts defense, the unmistakability doctrine has no application in this case. *See Kimberly Assocs.*, 261 F.3d at 869; *Resolution Trust Corp. v. FSLIC*, 34 F.3d 982, 984 (10th Cir. 1994); *Grass Valley*, 51 Fed. Cl. at 440; *General Dynamics v. United States*, 47 Fed. Cl. 513, 543 (2000). Further, even if the unmistakability doctrine did apply here,

Kimberly Assocs. v. United States, 261 F.3d 864, 869 (9th Cir. 2001) (finding it "unquestionable" that "the government was not acting in a 'public and general' capacity" when it passed ELIHPA, which "constituted a narrow, targeted piece of legislation aimed at relieving the government from onerous provisions contained in a finite number of specific contracts it had already entered"); *Grass Valley*, 51 Fed. Cl. at 443; *Adams v. United States*, 42 Fed. Cl. 463, 480 (1998) (sovereign acts defense inapplicable because ELIHPA "specifically targeted the termination options found in FmHA's contracts").[39] Thus, rather than undertaking the dubious task of legislatively abolishing rights under contracts which the government has entered into in its proprietary capacity, Congress focused its attention on the scope of the contracting agency's authority to perform under the contracts. In this manner, Congress left it to the agency to determine, in individual cases, whether owners will be permitted to exercise their right to leave the program.

In short, Congress avoided doing through ELIHPA precisely what the Federal Circuit held that it did, *i.e.*, "eliminating" petitioners' contractual right to prepay. Under the statute's scheme, petitioners' right to be freed

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the terms of petitioners' contracts satisfy the requirements of the doctrine. App. 176 (setting forth right to prepay in unambiguous terms); App. 173 (stating that agreement is "contractually binding" and can be changed only by written agreement); App. 165-66, 177, 181 (subjecting contract only to the governing statute as enacted and immunizing owners from inconsistent future regulations); *see also Winstar*, 518 U.S. at 887; *Lynch*, 292 U.S. at 580; *General Dynamics*, 47 Fed. Cl. at 546-48.

[39] *See also Mobil*, 530 U.S. at 619-20 (where sovereign acts defense not raised, government actions in passing legislation analyzed under standard contract principles: "the fact that [the government's] repudiation rested upon the enactment of a new statute makes no significant difference"); *Alaska Pulp Corp.*, 48 Fed. Cl. at 659 (rules applicable to a party's repudiation of a contract are "no different where the government as a party to the contract commits this same sin through subsequent legislation"). Here, as in *Mobil*, the government cannot rely on the sovereign acts defense, having failed to raise the argument below.

from the program's regulatory covenants can still be realized in certain circumstances. As a result, no breach or "elimination" of rights can be said to have occurred upon enactment of the statute, and the statute of limitations cannot be deemed to have accrued at that time.

II. The Federal Circuit Deemed Petitioners' Takings Claims To Accrue For Purposes of 28 U.S.C. § 2501 Before, Under This Court's Precedent, Those Claims Became Ripe For Review.

A. The 1938 Legislation Demands An "As Applied," Rather Than A "Facial," Takings Analysis.

This Court has long held that a takings claim based on a statute or regulation that allows for an agency decision on the scope of permissible use of the property at issue is not ripe for review until the agency renders such a decision. *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2458 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 735-39 (1997) (chronicling prior decisions); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985) (as-applied takings claim accrues when the government makes a final decision on "how it will apply the regulations" to the property); *Agins v. Tiburon*, 447 U.S. 255, 260-63 (1980).[40] Thus, where federal legislation regulates the use of property but provides an escape hatch permitting the agency to exempt certain property from its requirements, a

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[40] It is also well-settled that a property owner need not request an agency decision when doing so would be futile. *Suitum*, 520 U.S. at 738-40; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 n.3 (1992); *Cienega Gardens v. United States*, 265 F.3d 1237, 1246-48 (Fed. Cir. 2001). Because there has not yet been any discovery on petitioners' claims, there is no evidence in the record as to which petitioners have obtained a final agency decision and which can satisfy the futility doctrine. For simplicity, petitioners will at times refer herein to the need for an agency decision before a takings claim can become ripe, but expressly preserve their argument that certain petitioners will be able to establish that their claims satisfy the futility exception to the ripeness requirement.

takings claim is not ripe until the agency applies the legislation to the property in question. Otherwise, the agency's exercise of the authority granted to it under the statute to determine whether the owner will be permitted to use the property as desired would be undermined.

In *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981), for example, owners of coal mining lands alleged that the "mere enactment" of the Surface Mining Control and Reclamation Act effected a taking of their properties. Noting that the statute did not "categorically prohibit" the owners' intended use of the property, the Court held that the owners' takings claims were unripe. *Id.* at 297. The Court added that its holding did not preclude the owners from arguing that the statute "as applied" to their property resulted in a taking. *Id.* at 297 n.40; *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985) (government's mere assertion of jurisdiction over wetlands did not amount to a taking because under the permitting scheme created, "permission may be granted, leaving the landowner free to use the property as desired").[41]

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[41] The Courts of Appeal uniformly have recognized these principles and applied them in a variety of contexts, including both takings of real property interests (such as the case at hand) and cases involving purely monetary interests. *See, e.g., Gulf Power Co. v. FCC*, 208 F.3d 1263, 1271-72 (11th Cir. 2000); *Greenbrier v. United States*, 193 F.3d at 1358 (alleged taking of contractual prepayment right); *Waste Management, Inc. v. Metropolitan Government of Nashville and Davidson County*, 130 F.3d 731, 738 (6th Cir. 1997) (takings claim challenging waste disposal fee ordinance); *Liberty Mutual Insurance Co. v. Louisiana Department of Insurance*, 62 F.3d 115, 118 (5th Cir. 1995) (takings claim challenging insurance rate regulation); *Levald v. City of Palm Desert*, 998 F.2d 680, 689 (9th Cir. 1993) (takings claim regarding rent control ordinance); *Gilbert v. Cambridge*, 932 F.2d 51, 55-57 (1st Cir. 1991) (claim held unripe where scheme created by ordinance left open possibility "that landlords may be granted leave to use their property as they wish"); *cf. National Adver. Co. v. Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991) (takings claim accrued upon enactment of ordinance that demanded "immediate compliance without exception").

The application of this precedent to the 1988 legislation is clear-cut. As detailed above, ELIHPA provides that the FmHA must accept requests by owners to terminate their participation in the program when it determines, among other things, that "there is an adequate supply of safe, decent, and affordable rental housing within the market area of the housing and related facilities and sufficient actions have been taken to ensure that the rental housing will be made available to each tenant upon displacement." 42 U.S.C. § 1472(c)(5)(G)(ii) (App. 89).[42] If the agency makes these determinations, the restrictions imposed by ELIHPA do not apply and the owner will be freed from the regulatory covenants imposed by the program. Thus, under the precedent of this Court, there can be no doubt that petitioners' takings claims did *not* accrue upon the "mere enactment" of ELIHPA. Because the statute grants the FmHA the power to grant owner requests to be freed from the program's regulatory covenants in certain circumstances, petitioners' takings claims present "as-applied" takings that could become ripe for review only upon implementation of the new requirements by the agency. As such, petitioners' takings claims did not accrue until that time.[43]

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[42] Regulations issued under the statute similarly provide that "[i]n certain instances, prepayment may be approved" without any restrictions imposed on the owner. 7 C.F.R. § 1965.215(c). In particular, "prepayment may be accepted without restrictions" where, among other things, "there is no longer a need for the housing." *Id.* § 1965.215(c)(1),(3). App. 92-94.

[43] It goes without saying that petitioners' takings claims could not have *accrued* until they became *ripe* for review. *Levald, Inc.*, 998 F.2d at 687 ("Determining when the cause of action accrued is merely the corollary to the ripeness inquiry."); *Biddison v. Chicago*, 921 F.2d 724, 728-29 (7th Cir. 1991) ("[A] taking accrues at the same time that it ripens."); *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986) (Kennedy, J.) ("[T]he same considerations that render a claim premature prevent accrual of a claim for limitations purposes."); *cf. Plaintiffs in Winstar-Related Cases*, 37 Fed. Cl. at 182 ("For a cause of action to accrue and the statute of limitations to run, the claim must be ripe. Common sense, as much as case law, dictates this maxim, for the alternative would lead plaintiffs into

The Federal Circuit recognized as much in *Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999). There, HUD owners asserted a takings claim based on ELIHPA and a 1990 statute that restricted the agency's ability to approve prepayment requests. Noting that the legislation "expressly granted [HUD] authority to approve prepayment proposals" in some cases, the court held that the owners' takings claims were unripe because none of them had alleged that they sought HUD's approval. *Id.* at 1358-59; *see also Cienega Gardens v. United States*, 265 F.3d 1237, 1248 (Fed. Cir. 2001). Thus, while the court held that the takings claims of the HUD owners in *Greenbrier* were filed too early, it held that the materially indistinguishable takings claims of the FmHA, owners in *Franconia* were filed too late. There is no justification for the Federal Circuit's decision to follow this Court's precedent in *Greenbrier* and then ignore it in this case.[44]

B. The Decision Below Sidesteps This Court's Precedent By Ignoring The Language Of The Statute And Misstating Petitioners' Claims.

The Federal Circuit avoided these firmly entrenched principles of takings law only by turning a blind eye to the terms of the statute. In particular, the court disregarded the provisions of ELIHPA that require the FmHA to accept

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a conundrum in which their claims could be time-barred before even becoming amenable to judicial resolution.").

[44] Having prevailed in *Greenbrier* on its argument that each owner's takings claim would accrue only upon the agency's denial of a request to prepay, the government should have been estopped from taking the opposite position in this case simply because its interests have changed. The doctrine of judicial estoppel provides that "where a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have changed." *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996); *see also U.S. Philips Corp. v. Sears Roebuck & Co.*, 55 F.3d 592, 596 (Fed. Cir. 1995) (judicial estoppel preserves the integrity of the judicial process by preventing litigants from playing "fast and loose" with courts).

owner requests to terminate their participation in the program where the agency determines that there is no longer a need for the housing at the time the request is made. Had the court heeded the fact that the statute permits owners to be freed from the program's regulatory covenants in some cases, it would have had no choice but to analyze petitioners' takings claims on an as-applied basis.

By reading this exception out of the statute, the court was able to conclude, similar to what it held with respect to petitioners' contract claims, that the statute "took away and conclusively abolished" petitioners' property interests. App. 14. The court thus treated petitioners' claims as asserting only a facial taking,[45] and treated the legislation as effecting an outright conscription of petitioners' property rights. As explained above, however, Congress specifically avoided taking any action that would effect an immediate abrogation of rights. *See supra* at 33-39. Indeed, had ELIHPA resulted in an immediate confiscation of affected properties, as the Federal Circuit suggested, the government no doubt would have been held liable for a total taking of every Section 515 property in the country. *See United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982); *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 235 (1897); *cf. Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 891 (Fed. Cir. 1983) (government argued that it "was careful to refrain from exercising its power of eminent domain, an act that would have unquestionably required it to pay the just compensation required by the

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[45] The court thus upset the fundamental distinction between "facial" and "as-applied" takings claims. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987) (recognizing the "important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation"); *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992) (distinguishing "facial" and "as applied" takings claims and explaining that only the former ripens upon enactment of the challenged legislation); Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 19 & nn.67, 70 (Jan. 1995).

Constitution"). Such an action also would have required the government to provide notice to every Section 515 owner of its action and provide just compensation to each of them. *See Walker v. Hutchinson*, 352 U.S. 112, 115 (1956).

The Federal Circuit overlooked not only the terms of the statute and its own precedent, but also petitioners' allegations. Petitioners pled that a taking of their properties occurred as of the date that petitioners actually would have terminated their participation in the program and achieved freedom from the regulatory covenants but for the restrictions imposed by the legislation.[46] Thus, petitioners alleged that the agency's *application* of the legislation, and not its mere *enactment*, effected a taking.

The court's analysis is not saved by its characterization of petitioners' claims as alleging a taking of their contractual prepayment right.[47] App. 14. First, the notion that the property interest upon which petitioners base their takings claims is an "unfettered right to prepay" finds no source in petitioners' pleadings. Rather, the record makes clear that petitioners, as title owners of the land and buildings at issue,

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[46] *See* App. 132, 155 ("As of the date of Government performance required by each contract entered into between defendant and the plaintiffs, defendant's conduct constitutes a taking of plaintiffs' properties for public use . . ."); App. 132, 154 (identifying the "date of Government performance" as "the date that each plaintiff would terminate its contract but for the Government's repudiation"); App. 157-58 (statement of petitioner Phoebe J. Perri that she did not suffer any damages before her unsuccessful attempt to prepay her mortgage).

[47] While the statement of issues set forth by the Court references the impact of the legislation on petitioners' "contractual right," it also recognizes that the true interest at issue is the "right to freedom from regulatory covenants." The prepayment clause of petitioners' contracts is simply the vehicle by which petitioners can obtain that freedom, regain their full original fee simple interests in their properties, and use their properties as they desire.

assert takings of their state-created real estate interests.[48] Second, as the Federal Circuit recognized in *Greenbrier*, 193 F.3d at 1356-59, even if petitioners had pled solely a taking of a contractual right to prepay, the possibility that termination requests may be accepted in some cases precluded the court from limiting its inquiry to whether the mere enactment of the statute amounted to a taking.

Moreover, even if petitioners had not alleged as-applied takings of their real property interests, the Federal Circuit still would have been bound by the nature of the statute to employ an as-applied analysis. In cases where a facial takings claim is precluded by the fact that the statute does not categorically prohibit an owner's desired use of the property, the proper inquiry is whether the claim is ripe under an as-applied analysis. *See, e.g., Hodel*, 452 U.S. at 295-97 & n.40; *Pennell v. San Jose*, 485 U.S. 1, 9-10 (1988); *Greenbrier*, 193 F.3d at 1358-59 (rejecting facial takings claim and then proceeding to an as-applied takings analysis); *see also Riverside Bayview Homes, Inc.*, 474 U.S. at 126-27. In this case, however, the Federal Circuit improperly ignored the language of the statute, applied only a facial takings analysis, and concluded that the claims are time-barred.

The Federal Circuit held that petitioners—and, by extension, every owner in the Section 515 program—should have filed their claims by February 1994, regardless of whether they had any intention of terminating their participation in the program by that time. In so holding, the decision creates a new accrual standard for takings claims, providing that a statute can effect a taking before it has any

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[48] *See* App. 112 (alleging takings of petitioners' "properties"); App. 129 (alleging that the government effected "a taking of plaintiffs' properties for public use" by, among other things, "requiring plaintiffs to house low-income tenants"); App. 131 (alleging diminution in fair market value of properties). Petitioners' interests in their properties include the right to economically productive use and enjoyment, the right to exclusive possession, and the rights to transfer, devise, and dispose of their properties. *See generally* 5 Nichols, EMINENT DOMAIN, § 5.01(5) (2000).

impact on the use of the property at issue. Under the court's ruling, owners will now have to choose between either filing early and risking dismissal on ripeness grounds or filing later and risking dismissal on limitations grounds. *Bayou des Familles Dev. v. United States*, 130 F.3d 1034, 1037-38 (Fed. Cir. 1997) (noting that the government "uses the ripeness doctrine as both a sword and a shield"). Surely, the Takings Clause should not be the subject of such gamesmanship.

III. The Decision Below Creates Unworkable And Illogical Rules Governing The Accrual Of Claims Against The Government Under 28 U.S.C. § 2501.

The Federal Circuit's holding has created unjust and unmanageable results. Take for example a typical owner who entered into the program in 1979 and who, after twenty years, desired to leave the program in 1999. Assuming that the conditions for prepaying without restrictions could not be met at that time, the agency would deny the owner's request. If the owner then desired to file suit in 1999 against the government for its failure to honor the terms of the contract, the owner would find that its contract claim had already become time-barred in February 1994, six years after the enactment of ELIHPA. The decision below thus would compel this owner to file suit by 1994, five years before it even had any desire to exercise its prepayment option, and, consequently, before it suffered any damages. *See Terteling v. United States*, 334 F.2d 250, 254 (Ct. Cl. 1964) ("a claim does not accrue until the claimant has suffered damages").[49]

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[49] Ironically, the rule advocated by the government would seem to render it liable in other cases for damages in an amount greater than the rule petitioners advance. By asserting that any breach or taking occurred upon enactment of the statute, the government becomes vulnerable to liability for damages going back to that date. Petitioners, however, are only seeking damages for that period of time during which they actually were harmed: starting from when they desired to leave the program and were prevented by the agency from doing so. *See supra* at 14 n.17.

Even more peculiar results arise when petitioners' takings claims are considered. The owner described above clearly would not have a ripe takings claim until 1999, upon the agency's denial of its prepayment request (though the Federal Circuit apparently would hold otherwise). As a result, the owner would have to bring its contract claim between 1988 and 1994 and then bring its takings claim in a separate suit brought between 1999 and 2005. This would leave a span of seventeen years within which the two suits, based on nearly identical facts, could be brought. Not only would this result be prejudicial to the parties bringing and defending against such suits, it would generate immense judicial inefficiencies by requiring courts to address the same facts and issues in separate suits that could be brought years, even decades, apart.[50]

This scenario is similar to the plight of the only petitioner with respect to whom there is any evidence in the record on appeal concerning prepayment. See App. 157-58. Petitioner Phoebe J. Perri owns an apartment building in Palmyra, Wisconsin that has been in the Section 515 program since 1978. Ms. Perri decided to prepay and leave the program in 1993, and submitted a request to the FmHA in November of that year. *Id.* Her request was deemed complete as of March 1994 and was denied by the agency thereafter. Thus, Ms. Perri's takings claim became ripe after March 1994 upon the agency's denial. *Id.* Under the Federal Circuit's reasoning, however, both her contract and takings claims already would have become time-barred in February 1994. Thus, the Federal Circuit held that Ms. Perri's claims were time-barred before they could even be considered ripe for

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[50] The fact that the owner would be forced to file separate suits to assert its contract and takings claims would lead to the further problem that the owner might be faced with a *res judicata* or collateral estoppel challenge in the second suit because the two actions would involve the same operative facts, even though it had no choice but to bring its claims in separate actions. *Montana v. United States*, 440 U.S. 147, 153 (1979); *Bingaman v. Department of the Treasury*, 127 F.3d 1431, 1436-37 (Fed. Cir. 1997).

review under this Court's precedent. That same untenable result would hold true for any Section 515 owner who did not desire to prepay, or did not obtain a final agency-decision on a request to terminate, prior to February 1994.

It is also useful to consider Ms. Perri's plight in 1988. Had she analyzed the 1988 legislation at that time, she would have had no reason to believe that her contract had been breached or her property taken. If able to parse through the lengthy provisions of the new law, she would first conclude that the statute had no immediate impact on her use of the property. Rather, it would be apparent that the new conditions on her ability to leave the program would come into play only after she decided to prepay and submitted a request to the agency. She would also see that if and when she submitted a request to prepay, the agency would evaluate her request according to the procedures set forth in the statute, which might or might not result in her being freed from the regulatory covenants contained in her agreement with the government.

Thus, in February 1988, Ms. Perri had no way of knowing whether she ultimately would be permitted to exit the program if and when she decided to exercise her prepayment option. She also did not know whether the government might, as it had before in 1980, repeal the prepayment restrictions before she decided to prepay. A reasonable owner in Ms. Perri's shoes should conclude that the prudent course of action is to wait until it actually was ready to exit the program, submit a prepayment request at that time, and await the agency's decision. If the agency accepted the request and agreed to terminate the regulatory covenants, the owner would have no reason to sue. If the agency denied the request, the time would then be ripe to bring an action for damages.

Indeed, consider what would have happened if Ms. Perri had decided not to wait and sued immediately in 1988 for breach of contract and a taking of her property. At that time,

she would not have been able to allege truthfully that, absent the legislation, she would already have requested to prepay. Nor would she necessarily have been able to prove at that time that her request would have been denied if submitted to the agency. Thus, the suit no doubt would have been challenged, and dismissed, as premature. *See Williamson County*, 473 U.S. at 193; *Greenbrier*, 193 F.3d at 1358-59. Moreover, if she had sued before or during the pendency of her prepayment request, and the agency later accepted rather than denied her request, she may have found herself accused of commencing a frivolous action.

The threat of these dire consequences is real. Unjustifiable results already are emanating from the lower courts. As discussed in Part II.A, *supra*, the Federal Circuit has held that the takings claims of HUD owners accrued, not when ELIHPA was passed, but at the later time when the agency applied the legislation to each property. *See Greenbrier*, 193 F.3d at 1358-59. As a result, the claims of hundreds of HUD owners have been dismissed as premature because they sued *before* invoking the agency's procedures for submitting a request to prepay. *Id.* At the same time, the claims of hundreds of FmHA owners have been dismissed as untimely because they waited to sue until *after* requesting to prepay.

The Federal Circuit's inconsistent opinions in *Greenbrier* and *Franconia* have given the government *carte blanche* to defeat owners' claims on whatever ground best suits its needs. Only those owners with the good fortune to have claims that could be challenged neither as unripe nor as overripe can be heard on the merits. The government has been playing fast and loose in these housing cases, and the courts below have chosen not to intervene. This Court should correct the decisional flip-flop by the Federal Circuit and prevent the government from successfully arguing directly contrary positions in different cases to defeat otherwise meritorious claims.

Statutes of limitation are designed to promote judicial efficiency and fairness. *See Lampf v. Gilbertson*, 501 U.S. 350, 357 (1991) ("limitations periods in general promote important considerations of fairness"); *Board of Regents v. Tomanio*, 446 U.S. 478, 487-88 (1980) (statutes of limitation "have long been respected as fundamental to a well-ordered judicial system"). Limitations rules that are logical and predictable create a level playing field in which plaintiffs can fairly obtain relief in the courts and putative defendants can be aware of when they may be subject to suit. Here, neither the government nor the petitioners could know whether the FmHA would permit any given owner to terminate its participation in the Section 515 program until that date upon which each owner decided to submit a prepayment request and either (1) learned that the agency had denied the request, or (2) concluded that, under the circumstances at issue, the agency had no authority to grant the request. Because every petitioner filed suit within six years of that date, fundamental considerations of fairness require that their claims be deemed timely and heard on the merits.

CONCLUSION

This Court should reverse the decision of the Federal Circuit, hold that petitioners' contract and takings claims were filed in a timely manner under 28 U.S.C. § 2501, and permit petitioners' claims to proceed to trial.

February 19, 2002

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FRANCONIA ASSOCIATES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

GRASS VALLEY TERRACE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a breach of contract claim accrues for purposes of 28 U.S.C. 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans.

2. Whether a Fifth Amendment takings claim accrues for purposes of 28 U.S.C. 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans.

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In the Supreme Court of the United States

No. 01-455

FRANCONIA ASSOCIATES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

GRASS VALLEY TERRACE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in *Franconia Associates, et al.* v. *United States* (Pet. App. A1-A16) is reported at 240 F.3d 1358. The opinions of the Court of Federal Claims in *Franconia* (Pet. App. A17-A44) are reported at 43 Fed. Cl. 702 and 44 Fed. Cl. 315 (reconsideration). No opinion was issued by the court of appeals in *Grass Valley, et al.* v. *United States.* The opinion of the Court of Federal Claims in *Grass Valley* (Pet. App. A45-A68) is reported at 46 Fed. Cl. 629.

JURISDICTION

The judgment of the court of appeals in *Franconia* was entered on February 15, 2001. A petition for rehearing was denied on June 12, 2001 (Pet. App. A69-A70). The judgment of the court of appeals in *Grass Valley* was entered on May 17, 2001. On July 31, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari in *Grass Valley* to and including September 14, 2001. The petition for a writ of certiorari was filed on September 10, 2001. The petition was granted on January 4, 2002. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Sections 515 and 521 of the Housing Act of 1949, 42 U.S.C. 1485, 1490a (1994 & Supp. V 1999), the Farmers Home Administration (FmHA) makes direct loans to private, non-profit entities to develop and/or construct rural housing designed to serve the elderly and low- or middle-income individuals and families.[1] Section 515 loans require the borrower, *inter alia*, to execute various loan documents, including a loan agreement, a promissory note, and a real estate mortgage.

Before December 21, 1979, each petitioner entered into a loan agreement with the FmHA under Sections

[1] Since 1994, the program has been entrusted to the Rural Housing Service. See Pet. App. A2 n.1. The Secretary of Agriculture was authorized to establish the Rural Housing and Community Development Service by the Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, Tit. II, § 233, 108 Stat. 3219; as amended by the Act of Apr. 4, 1996, Pub. L. No. 104-127, Tit. VII, §§ 747(b)(3), 753(b)(2), 110 Stat. 1128, 1131. See also 7 C.F.R. 2003.18 (functional organization of RHS). For convenience, references in this brief to the Farmers Home Administration should be understood to refer to that agency and its successor.

515 and 521, "in order to provide rental housing and related facilities for eligible occupants * * * in rural areas." Pet. App. A165. In the loan agreements, each petitioner certified that it was unable to obtain a comparable loan in the commercial market. See *id.* at A177. In addition, the loan agreements contained various provisions designed to ensure that the projects were affordable for persons and families with low incomes. Those provisions included restrictions as to eligible tenants, the rents petitioners could charge, and the rate of return petitioners could realize, as well as requirements regarding the maintenance and financial operations of each project. See *id.* at A165-A174. Each loan agreement also specified the length of the loan, which was generally 40 or 50 years. *Id.* at A3.

The promissory notes executed by petitioners specified that petitioners must pay the principal on the mortgage in scheduled installments, plus interest. See Pet. App. A176-177. Those notes also contained the prepayment provision that has been affected by the legislation in this case: "Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of the Borrower." *Id.* at A176. No other provision of the loan documents addressed prepayment.

2. In 1979, Congress found that many Section 515 participants had prepaid their mortgages, thus threatening the continued availability of rural low- and moderate-income housing. Finding that it had been "the clear intent of Congress that these projects be available to low and moderate income families for the entire original term of the loan," Congress amended the National Housing Act to preclude the loss of low-cost rural housing due to prepayments. H.R. Rep. No. 154, 96th Cong., 1st Sess. 43 (1979). In the Housing and

Community Development Amendments of 1979, Pub. L. No. 96-153, 93 Stat. 1101, Congress prohibited the FmHA from accepting prepayment of any loan made before or after the date of enactment unless the owner agreed to maintain the low-income use of the rental housing for either a 15-year or 20-year period from the date of the loan. § 503(b), 93 Stat. 1134-1135. That requirement could be avoided if the FmHA determined that there was no longer a need for the low-cost housing or if Federal or other financial assistance provided to residents would no longer be provided. *Ibid.*

In 1980, Congress further amended the National Housing Act to eliminate retroactive application of the Section 515 prepayment changes enacted in the 1979 legislation. The Housing and Community Development Act of 1980, Pub. L. No. 96-399, 94 Stat. 1614, provided that the prepayment restrictions included in the 1979 legislation would apply only to loans entered into after December 21, 1979, the date of enactment of that legislation. § 514, 94 Stat. 1671-1672. The 1980 Act also required the Secretary of Agriculture to report to Congress about any adverse effects of the repeal upon the availability of low-income housing. Pub. L. No. 96-399, § 514, 94 Stat. 1671-1672.

3. By 1987, Congress had again become concerned about the dwindling supply of low- and moderate-income rural housing in the face of increasing prepayments of mortgages under Section 515.[2] A House of Representatives Committee found that owners were

[2] In 1986, Congress had passed a temporary moratorium that precluded Section 515 prepayments in most cases. The moratorium originally was to expire in 1987, but it was extended into 1988 by another temporary measure. See 42 U.S.C. 1437 note (citing and quoting temporary measures).

"prepay[ing] or * * * refinanc[ing] their FmHA loans, without regard to the low income and elderly tenants in these projects." H.R. Rep. No. 122, 100th Cong., 1st Sess. 53 (1987).

In response, Congress passed the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1877 (ELIHPA), which amended the Housing Act of 1949 to impose permanent restrictions upon prepayment of Section 515 mortgages that were entered into before December 21, 1979. That legislation, enacted on February 5, 1988, requires that before FmHA can accept an offer to prepay a mortgage entered into before December 21, 1979,

> the [FmHA] shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities for not less than the 20-year period beginning on the date on which the agreement is executed.

Pub. L. No. 100-242, § 241, 101 Stat. 1886. The legislation further provides that the FmHA may include incentives in such an agreement, including an increase in the rate of return on investment, reduction of the interest rate on the loan, and an additional loan to the borrower. § 241, 101 Stat. 1886-1887.

Under ELIHPA, if the FmHA determines after a "reasonable period" that an agreement cannot be reached, the FmHA must require the owner to offer to sell the housing to "any qualified nonprofit organization or public agency at a fair market value determined by 2 independent appraisers." Pub. L. No. 100-242, § 241, 101 Stat. 1887. If an offer to buy is not made by a nonprofit organization or agency within 180 days, the

FmHA may accept the owner's offer to prepay or request refinancing. *Ibid.* The offer-for-sale requirement does not apply if the owner agrees to utilize the housing for the purposes set out in Section 515 for a period designated by the FmHA and then offer to sell the housing to a nonprofit organization or public agency. The offer-for-sale requirement also does not apply if the FmHA determines that housing opportunities for minorities "will not be materially affected" by prepayment and either (1) the tenants will not be displaced by prepayment or (2) there is an "adequate supply" of "affordable" housing in the market area and "sufficient actions have been taken to ensure" that such housing "will be made available" to displaced tenants. § 241, 101 Stat. 1889. After ELIHPA, the FmHA may not allow prepayments without following the detailed provisions of the Act.

The FmHA promulgated regulations to implement ELIHPA on April 22, 1988, and the regulations became effective on May 23, 1988. 53 Fed. Reg. 13,245 (1988), codified at 7 C.F.R. 1965.90 (1989).

In 1992, Congress passed the Housing and Community Development Act of 1992. Pub. L. No. 102-550, 106 Stat. 3672 (codified in relevant part at 42 U.S.C. 1472(c) (1994 & Supp. V. 1999)) (the "1992 legislation"). That legislation had no effect whatever on petitioners' loans. See Pet. App. A13. It did, however, extend ELIHPA's restrictions to loans that were made after those of petitioners, *i.e.*, loans made from December 21, 1979, through 1989. Pub. L. No. 102-550, § 712, 106 Stat. 3841.

Current regulations governing Section 515 prepayments establish a process by which the FmHA addresses prepayment requests, including detailed procedures and requirements regarding whether housing

opportunities for minorities will be affected by prepayment and whether other housing has been made available for tenants displaced by prepayment. 7 C.F.R. 1965.215. The regulations also provide that, with respect to "develop[ing] an incentive offer," that "[a] reasonable effort must be made to enter into an agreement with the borrower to maintain the housing for low-income use that takes into consideration the economic loss the borrower may suffer by foregoing prepayment." 7 C.F.R. 1965.210. In addition, the regulations clarify that the determinations required by 42 U.S.C. 1472(c)(5)(A) before prepayment can be accepted—regarding the effect on minority housing opportunities, the displacement of tenants, and the supply of affordable housing in the market—will not be made unless and until the FmHA is unable to reach an agreement with a borrower on extending the borrower's participation in the Section 515 program. 7 C.F.R. 1965.215(a).

4. Petitioners in *Franconia* filed this action in the Court of Federal Claims on May 30, 1997. Plaintiffs in the case included both petitioners—all of whom had entered into loan agreements before December 21, 1979, and were therefore subject to ELIHPA—and other plaintiffs, who had entered into loan agreements after December 21, 1979, and were therefore unaffected by ELIHPA. See Pet. App. A3 n.2. Petitioners' complaint in *Franconia* alleged that the prepayment provisions of their promissory notes gave them a "contractual right * * * to terminate their contracts by prepaying their [mortgages] at any time at their option." *Id.* at A126. They claimed that ELIHPA "repudiated the contractual right of [petitioners] to terminate their contracts at any time at their option." *Ibid.*

The Court of Federal Claims granted the government's motion to dismiss petitioners' claims, on the ground that they were barred by the six-year statute of limitations in 28 U.S.C. 2501. Pet. App. A17-A44. Section 2501 provides:

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

The court held that petitioners' contract claims accrued on May 23, 1988, the effective date of regulations implementing ELIHPA, and, because petitioners did not file their action until 1997, their claims did not fall within the six-year statute of limitations in 28 U.S.C. 2501. Pet. App. A34.

The court rejected petitioners' contention that the relevant legislation should be treated as merely an anticipatory repudiation, which does not trigger the commencement of the limitations period unless the owner chooses to treat it as a breach. Pet. App. A30. The court reasoned that the prepayment provision in the loan contracts by its terms promised petitioners an "*unfettered* prepayment right," that "[n]o conditions [were] attached to this promise," and that it "extend[s] throughout the life of the loan agreements." *Id.* at A31-A32 (emphasis in original). The court held that ELIHPA "withdrew this promise" so that "borrowers could no longer prepay their contracts without first going through lengthy and onerous procedures." *Id.* at A31. Because "[w]ith the 1988 legislation, the government broke its promise, ending its performance under the contract," the "breach * * * occurred at the time of the legislation." *Id.* at A32.

The court also, sua sponte, dismissed petitioners' taking claims. Pet. App. A34. The court noted that petitioners asserted that the "[government's] conduct constitutes a taking of their property." *Ibid.* The court observed that "[t]here is only one instance of [government] conduct at issue—Congress's change of the prepayment option." *Ibid.* Accordingly, "[a]s this action is alleged to have constituted a taking, the claim would have accrued at the time of the 1988 legislation, which * * * was when Congress by law changed the plaintiffs' prepayment rights." *Ibid.* The court explained that "[t]he discussion * * * relevant to the breach of contract claim * * * is equally applicable to the takings claim." *Ibid.*

5. The Federal Circuit affirmed the lower court's dismissal of the *Franconia* petitioners' claims. Pet. App. A1-A14. The court agreed with the Court of Federal Claims that the prepayment provision of petitioners' loan agreements "gave [petitioners] an unfettered right to prepay their loans at any time." *Id.* at A10. It "did not require any performance on the part of the government because it constituted an unconditional promise on the part of FmHA to allow borrowers to prepay their loans, an obligation which extended for the life of the loan." *Ibid.* Accordingly, "[i]f that continuing duty was breached, the breach occurred immediately upon enactment of ELIHPA because, by its terms, ELIHPA took away the borrowers' unfettered right of prepayment." *Ibid.* Although the court of appeals thus disagreed with the Court of Federal Claims' conclusion that petitioners' action accrued upon the effective date of the regulations implementing ELIHPA, see *id.* at A12 n.3, that disagreement was of no consequence, because petitioners' suit was time-barred when

measured against either ELIHPA's effective date or the effective date of the implementing regulations.

The court acknowledged the anticipatory breach doctrine and its application to the government. The court stated that "if the enactment of ELIHPA was not a breach, but simply an act of anticipatory repudiation, then [petitioners'] claims did not accrue until some subsequent action by the government brought about an actual breach, although [petitioners] had the right to bring suit immediately upon the government's repudiation of its obligation under the loan contracts." Pet. App. A10. The court held, however, that "[t]he doctrine of anticipatory repudiation does not apply in this case, * * * because * * * [t]he government contracted to allow borrowers the unfettered right to prepay their loans and breached that promise, if at all, through the enactment of ELIHPA." *Id.* at A10-A11.

The court also rejected petitioners' claim that the action accrued only upon the enactment of the 1992 legislation. Petitioners argued that "language in [ELIHPA] prohibits the 1988 legislation from serving as the date of breach because the elimination of prepayment rights was only temporary." Pet. App. A13. The court explained, however, that although "parts of ELIHPA were 'interim measures,' the section relating to FmHA loans was wholly permanent." *Ibid.* (quoting ELIHPA, Pub. L. No. 100-242, § 202, 101 Stat. 1878). The court noted that the 1992 legislation, on which petitioners sought to rely, "impacted only post December 21, 1979 borrowers," and thus had no effect on them. *Id.* at A13 n.4.

The court of appeals also affirmed the trial court's dismissal of petitioners' taking claims. Pet. App. A13-A14. The court stated that "[t]he government's liability for a takings claim becomes fixed when the property at

issue is taken," and that "[c]ontract rights are a form of property that may be appropriated by the government." *Id.* at A14. The court held, however, that "[b]ecause [petitioners] brought this suit in May of 1997, more than six years after ELIHPA effected an appropriation of their contract right, their takings claims are barred by the statute of limitations." *Ibid.*

6. On September 16, 1998, the *Grass Valley* petitioners—all of whom had entered into Section 515 loan agreements before December 21, 1979—and other plaintiffs filed an action in the Court of Federal Claims virtually identical to the *Franconia* action. On April 12, 2000, that court granted the government's motion to dismiss petitioners' claims, essentially for the same reasons that it had dismissed the claims of the *Franconia* petitioners. Pet. App. A45-A68. On May 17, 2001, the United States Court of Appeals for the Federal Circuit affirmed without opinion. Pet. App. A15-A16.

SUMMARY OF ARGUMENT

I. This case concerns the application of the statute of limitations in 28 U.S.C. 2501, which provides that any claim in the Court of Federal Claims must be filed "within six years after such claim first accrues," to petitioners' claims that ELIHPA restricted their prepayment rights in violation of their contracts. As a waiver of sovereign immunity, Section 2501 must be strictly construed in favor of the government. The emphasis on promptness conveyed by the terms of the statute ("*first* accrued") is supported not only by the need to avoid stale claims that supports any statute of limitations, but also by the particular need of Congress to have reasonably prompt notice if a statute breaches government contracts.

It is settled law that claims first accrue when plaintiffs are first able to file suit. Plaintiffs alleged that their loan documents gave them an *unfettered* right to prepay their loans at their option any time during the 40- or 50-year terms of their loans. The terms of ELIHPA, however, eliminated that unfettered right, replacing it with a substantially more limited and uncertain possibility of prepayment, subject to what petitioners describe as lengthy, cumbersome, and costly procedures. Accordingly, as the Federal Circuit recognized, the government breached its promise, if at all, when ELIHPA eliminated petitioners' unfettered prepayment right, and petitioners could have filed suit at any time after ELIHPA was enacted. Because petitioners instead waited nine or ten years after ELIHPA to file suit, their claims are time-barred.

Petitioners invoke the doctrine of "anticipatory repudiation," under which a party's mere statement of intent to commit a breach in the future does not start the statute of limitations running until such later time as an actual breach occurs. The anticipatory breach doctrine is inapplicable in this case, because ELIHPA is not a mere statement of intent to commit a breach by a private actor or government contracting officer. It is a duly enacted law that immediately and permanently prevented the FmHA from performing its alleged contractual obligations. Moreover, the purpose of the anticipatory breach doctrine is to permit the non-breaching party to await the time of performance to file suit, thereby giving the repudiating party the opportunity to change its mind and comply with its contractual obligations in the end. Treating ELIHPA as merely an anticipatory breach would not serve that purpose. After ELIHPA, no federal official could simply decide to accept a tendered prepayment from petitioners.

Petitioners argue that *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000), established that ELIHPA was merely an anticipatory repudiation, not an actual breach. That case, however, had nothing to do with either the distinction between an anticipatory repudiation and a present breach or the date of accrual of a claim under a statute of limitations. Accordingly, the Court in *Mobil* had no occasion to—and did not—examine the difference between an anticipatory repudiation and a present breach. To the contrary, the Court in *Mobil* referred to the statute at issue there both as an anticipatory statement of intent not to perform and as a present breach, and nothing turned on which characterization was correct.

More generally, petitioners err in asserting that the court of appeals' decision exempts the government from standard contract law principles applicable to private parties. An Act of Congress (such as ELIHPA) does not have the same effect as a mere statement of intent not to perform a contract. Moreover, an Act of Congress could not constitute an anticipatory repudiation of a non-government contract, so the search for an exact parallel in contracts solely between private parties is futile. In addition, the rules requiring strict construction of a statute of limitations that is a condition of a waiver of sovereign immunity do not apply to statutes of limitations governing private contracts. The court of appeals based its decision not on a principle that ordinary rules of contract law are inapplicable to the government, but rather on the resolution of the particular issues that arise in interpreting ELIHPA and applying Section 2501—a statute that has no application to claims against private parties—to petitioners' breach of contract claims.

II. The court of appeals correctly held that any taking claims petitioners may have under the Just Compensation Clause are time-barred for the same reasons as their contract claims. Petitioners' taking claims are not independently viable in any event, because damages for breach of their contracts would eliminate any taking claims by providing sufficient compensation for any property rights that could have been taken. But even if that were not true, their taking claims would be entirely parasitic on their contract claims, in the sense that if there was no breach of contract, there was also no taking; petitioners could not complain that the government had imposed restrictions on their properties that constituted a taking if they themselves had agreed to those restrictions and received (and continue to receive) consideration for that agreement.

Because petitioners' taking claims are, at best, completely dependent on petitioners' contract claims, the taking claims should be treated as having accrued at the same time as the contract claims. Otherwise, those in petitioners' position would be able to plead themselves out of the time bar imposed by Section 2501 simply by reformulating their contract claims as taking claims.

ARGUMENT

I. PETITIONERS' CONTRACT CLAIMS ACCRUED UPON ENACTMENT OF ELIHPA

A. Section 2501 Requires That Claims Be Brought Within Six Years After They First Accrued

Under 28 U.S.C. 2501, "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The

principles requiring a strict construction of Section 2501 in favor of the sovereign are not in doubt and have been repeatedly and recently reaffirmed by this Court.

Section 2501 "makes it a condition or qualification of the right to a judgment against the United States that * * * the claim must be put in suit * * * within six years after suit could be commenced thereon against the Government." *Finn* v. *United States*, 123 U.S. 227, 232 (1887). Such provisions are "'a central condition' of the sovereign's waiver of immunity." *Raygor* v. *Regents of the Univ. of Minn.*, 122 S. Ct. 999, 1005 (2002) (quoting *United States* v. *Mottaz*, 476 U.S. 834, 843 (1986)); see also *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). It is a fundamental principle that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)); see also *United States* v. *Testan*, 424 U.S. 392, 399 (1976). Accordingly, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996); see also *Office of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 432 (1990) (noting "many precedents establishing that authorizations for suits against the Government must be strictly construed in its favor"); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979) (applying principle to statute of limitations). Almost fifty years ago, *Soriano* v. *United States*, 352 U.S. 270, 276 (1957), specifically applied that rule of construction to Section 2501, noting that the Court "has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed."

Two related textual features of Section 2501 reinforce the conclusion that its limitations period must

be strictly construed. First, Congress provided in Section 2501 for a generous six-year period in which to bring claims. That is ample time for even the most hesitant plaintiffs to learn of a governmental action that may lead to a claim and to commence an action. Moreover, extending suits beyond that period would defeat Congress's strong interest in protecting the government from stale claims, lost memories, and missing documents. See *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 415-416 (1998).

Extending the six-year period also would interfere with the government's distinctive interest in preserving its ability to have reasonably prompt notice of the fiscal implications of past enactments and to take into account the costs of those past actions in making future budgetary and programmatic decisions. In a case like this, in which the claim is that a *statute* has caused a breach of contract, the rule of strict construction of statutes of limitations has special force, because it serves the salutary purpose of ensuring that a Congress close to the one that enacted the statute—rather than a Congress serving perhaps many decades later—may and must address the consequences of the statute, by increasing taxes, reducing spending, or revisiting the wisdom of the enactment. A contrary rule in this case could delay the final reckoning of the fiscal impact of ELIHPA for 40 or more years. The government's interests in allowing a reasonably prompt accounting for the consequences of government action make it particularly important that limitations periods that are conditions on waivers of sovereign immunity, such as the six-year period in Section 2501, be strictly construed.

Second, the text of Section 2501 itself provides an indication that Congress intended a strict construction of its provisions. Section 2501 provides not merely that

a claim must be brought within six years of accrual, but that it must be brought within six years of when the claim "first" accrues. It is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW, Inc.* v. *Andrews*, 122 S. Ct. 441, 449 (2001); *United States* v. *Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971); *Market Co.* v. *Hoffman*, 101 U.S. 112, 115-116 (1879). In Section 2501, the term "first" serves the function of emphasizing Congress's interest in seeing to it that the commencement of the generous six-year period for bringing claims must be the earliest possible date on which the claim accrued.

B. The Claims In This Case First Accrued When Congress Enacted ELIHPA

1. A claim accrues "when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 522 U.S. 192, 201 (1997). "[A] cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Ibid.* For a breach of contract claim, that generally occurs at the time of the alleged breach. 1 C. Corman, *Limitation of Actions* § 7.2.1, at 485-486 (1991) ("The statute of limitations for a breach of contract begins to run at the time of such breach, even when the extent of actual damages is not then ascertainable."); see also *Kinsey* v. *United States*, 852 F.2d 556, 557 (Fed. Cir. 1988) (cause of action accrues under Section 2501 "when all the events have occurred which fix the liability of the Government"). Accordingly, to determine when petitioners' claims accrued, it must be determined when the alleged breach of contract occurred.

2. To determine when a breach of contract occurs, it is essential to identify the promise that was breached. For purposes of this case, it may be assumed that the allegations of petitioners' complaints—including the allegations regarding the promises contained in their contracts—are true. In ruling on claims of other plaintiffs in *Franconia*, the Court of Federal Claims found that the Section 515 loan documents, when read as a whole and in light of applicable canons of construction, cannot be construed to include a promise to permit other plaintiffs to prepay even in the face of a federal statute modifying prepayment rights. See Pet. App. A35-A43 (Franconia).[3] At least one other court of appeals has reached a similar conclusion. See, *e.g.*, *Parkridge Investors Ltd.* v. *Farmers Home Admin.*, 13 F.3d 1192, 1198 (8th Cir.), cert. denied, 511 U.S. 1142 (1994); but cf. *Kimberly Assoc.* v. *United States*, 261 F.3d 864, 869-870 (9th Cir. 2001) (disagreeing about applicable contract interpretation principles). If that is correct, then there was no breach of contract, and petitioners would not prevail on the merits. Nonetheless, for purposes of this case, it may be assumed that petitioners obtained precisely the promise that they allege —a promise that permits them an unfettered right to prepay.

3. The promise allegedly at issue in this case therefore is, in the terms used by both courts below, petitioners' "unfettered right to prepay their loans at any time" over the life of those loans. Pet. App. A10; see *id.* at A31, A55. The prepayment provisions of their

[3] The Court of Federal Claims in *Grass Valley* initially reached the same conclusion. Pet. App. A58-A67. The court has subsequently reconsidered that ruling. *Grass Valley Terrace* v. *United States*, 51 Fed. Cl. 436 (2002).

documents provided that "[p]repayments of scheduled installments or any portion thereof, may be made at any time at the option of Borrower." *Id.* at A122 (*Franconia* complaint); see *id.* at A176 (loan document). Petitioners' complaints alleged that under those provisions, petitioners "were entitled * * * to terminate their contracts by prepaying their mortgages at any time at their option." *Id.* at A123; see *id.* at A112 ("optional termination rights could be exercised by [petitioners] 'at any time' prior to the termination of the forty (40) or fifty (50) year terms of their contracts"); A137 (same).

Petitioners thus alleged that, before ELIHPA, whenever a borrower tendered the total amount due on the loan, the encumbrance on that borrower's property had to be removed. In petitioners' terms, they were "contractually entitled to terminate their participation in the Government's housing program by exercising their option to prepay at any time." Pet. App. A112. To be sure, it is likely that the prepayment provision would have required the borrower in each case to submit to certain formalities designed to ensure that the correct amount was in fact paid. But, aside from those formalities, in petitioners' view, the prepayment provision gave the government no right whatever to refuse the prepayment or to refuse to take reasonable steps to remove the encumbrance on the borrower's property.

As the court of appeals held, "ELIHPA took away the borrowers' unfettered right of prepayment." Pet. App. A10. ELIHPA essentially precluded a borrower from prepaying the loan at any time at the borrower's option. As the complaints alleged, ELIHPA provided for "forced sales of * * * owners' properties" under "lengthy, cumbersome, and costly procedures" if the

owners wanted to prepay their loans. *Id.* at A127.[4] The complaints alleged that, when prepayments were tendered, "[t]he Government has in every instance refused to accept prepayment * * * pursuant to the provisions of [the] contracts." *Id.* at A129. As a result, petitioners "have suffered * * * diminutions in the fair market value of their properties as a * * * result of * * * the extended restrictions on the profitable use of their properties," "the costs associated with continuing to operate under and comply with rules and regulations associated with the Government's housing programs," and "the lost opportunity costs associated with investment and business opportunities [petitioners] have been foreclosed from pursuing." *Id.* at A131. Petitioners alleged that ELIHPA "has deprived and will deprive each [of petitioners] of its contractual right to terminate its contract at any time at its option." *Id.* at A132.

Those allegations are based on the plain terms of ELIHPA. Under ELIHPA, the FmHA cannot allow prepayment until it has "ma[d]e reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing" for at least 20 years. 42 U.S.C. 1472(c)(4)(A). Moreover, if

[4] This and other allegations in the complaint referred to the 1992 legislation, not to ELIHPA itself, which was enacted in 1988. The court of appeals correctly held, however, that the 1992 legislation had no effect whatever on petitioners and imposed no new restrictions on their prepayment or other rights. See Pet. App. A13 n.4. Petitioners have not challenged that ruling before this Court. See p. 10, *supra*. Accordingly, for purposes of construing petitioners' complaint, this brief treats petitioners' allegations regarding the 1992 legislation as regarding ELIHPA, unless otherwise indicated.

"after a reasonable period," no such agreement is possible, FmHA must require the borrower "to offer to sell the assisted housing" to "any qualified nonprofit organization or public agency at a fair market value determined by 2 independent appraisers." 42 U.S.C. 1472(e)(5)(A)(i). Finally, if no agency accepts that offer after 180 days, see 42 U.S.C. 1472(c)(5)(A)(ii), or if the FmHA determines "that housing opportunities of minorities will not be materially affected as a result of the prepayment," that "there is an adequate supply of safe, decent, and affordable rental housing within the market area," and that "sufficient actions have been taken to ensure that the rental housing will be made available to each tenant upon displacement," 42 U.S.C. 1472(c)(5)(G)(ii)(II), it may accept the offer to prepay.

In short, before ELIHPA, petitioners had an unfettered legal right to prepay at any time, granted in their loan documents. After ELIHPA, petitioners no longer had that right, because Congress had eliminated it and substituted a far more limited and uncertain possibility of prepayment—subject to what petitioners describe as "lengthy, cumbersome, and costly procedures" and the possibility of losing their properties entirely through what they allege would have been a "forced sale" at less than a market-determined price. Accordingly, ELIHPA "took away the borrowers' unfettered right of prepayment," Pet. App. A10, and the government thus "breached [its] promise, if at all, through the enactment of ELIHPA." *Id.* at A11.

ELIHPA was enacted on February 5, 1988. See Pub. L. No. 100-242, § 241, 101 Stat. 1886. As petitioners themselves appear to concede (Br. 27), they could have filed their claims on that date. Under Section 2501, therefore, their claims "first accrued" on that date, and petitioners had six years thereafter in which to bring

suit. Instead they waited nine years (in *Franconia*) and ten years (in *Grass Valley*) to file their claims. Those claims were therefore barred by Section 2501.

C. ELIHPA Was Not An Anticipatory Repudiation

Petitioners invoke the doctrine of "anticipatory repudiation" to argue (Br. 27) that they had the option of filing their claims either when ELIHPA was enacted or at whatever later time each petitioner elected to tender prepayment and was denied the right to prepay its loan. The court of appeals, however, correctly held that the enactment of ELIHPA was not an anticipatory repudiation and did not therefore permit them to wait as long as they wished before filing suit.

1. The court of appeals recognized the doctrine of anticipatory repudiation and held that doctrine applicable to the government. The court explained that

> [a]n anticipatory repudiation occurs when an obligor communicates to an obligee that he will commit a breach in the future * * *. In such a situation, the normal rule is that the statute of limitations begins to run from the date of performance specified in the contract unless the obligee elects to sue earlier for anticipatory repudiation.

Pet. App. A10. The court further noted that

> if the enactment of ELIHPA was not a breach, but simply an act of anticipatory repudiation, then appellants' claims did not accrue until some subsequent action by the government brought about an actual breach, although [petitioners] had the right to bring suit immediately upon the government's repudiation of its obligation under the loan contracts.

Ibid.; see *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U.S. 581, 589 (1916). Petitioners do not appear to disagree with that general statement of the doctrine, its effect on the statute of limitations, or its application to the government.

Petitioners may not take advantage of the anticipatory breach doctrine in this case, because ELIHPA effected a breach of their contract, not a mere repudiation. Pet. App. A10-A11. To paraphrase the court of appeals, ELIHPA did not merely "communicate[] that [the government] will commit a breach in the future." *Id.* at A10. Because ELIHPA was a statute duly enacted by Congress, it eliminated, as a matter of law, petitioners' unfettered contractual right to prepay their loans at any time. The answer to the question whether petitioners had an unfettered right to prepay was unambiguous immediately after ELIHPA's enactment. According to petitioners' own allegations, ELIHPA substituted for an unfettered right to prepay a much different and inferior ability to seek to obtain government permission to prepay under narrow conditions after a substantial waiting period and subject to numerous and burdensome conditions. Because it unambiguously eliminated their unfettered legal right to prepayment, ELIHPA was a breach of their contract, not a mere repudiation.

Petitioners attempt to rely (Br. 28) on the inapposite principle "that a party's statement that it will not honor the terms of an option contained in a contract constitutes an anticipatory repudiation, such that the option-holder need not bring suit until after it attempts to exercise the option and the repudiating party fails to perform by accepting the tender." The cases cited by petitioners (see Br. 28) for that proposition all concern private options contracts, in which one private party simply manifested its intent not to perform. Those cases presumably would apply in a government case as

well, if a contracting officer simply informed a private contracting party that the government did not intend to perform a future contractual obligation. Any such statement by the contracting officer could not alter the private party's *legal right* under the contract to continuing performance, and the private party accordingly could wait for the performance to come due before filing suit. In this case, however, it is an Act of Congress that affected (and allegedly eliminated) petitioners' contractual rights, not a mere statement by a private individual or even by a federal contracting officer. The law fundamentally altered the legal rights of the parties and, according to petitioners, eliminated their unfettered right to prepay at any time. Accordingly, under petitioners' view of the case, that law constituted a breach of contract, not a mere statement of intent not to perform in the future.

2. Petitioners argue extensively (Br. 32-37) that ELIHPA in fact preserved their prepayment right in some respects. Insofar as ELIHPA did so, that simply limits the scope of the alleged breach. Petitioners' complaints were based on the ways in which ELIHPA allegedly breached their contractual rights, not the fact that it honored their rights in some respects.[5] They

[5] In this regard, it is significant that petitioners did not allege that they went through the entire ELIHPA process to determine ultimately whether they would be permitted to prepay, and it is not known on this record whether any of them would ultimately have been permitted to prepay. Instead, petitioners simply alleged that some (but not all) of them tendered prepayment—without going through the ELIHPA process—and "[t]he Government has in every instance refused to accept prepayment." Pet. App. A129. Thus, the gravamen of their complaint is that the very act of being relegated to the process required by ELIHPA violates their contractual rights.

alleged that ELIHPA "provides for forced sales of said owners' properties" and "required" them to follow "lengthy, cumbersome, and costly procedures." Pet. App. A127. They also alleged that "[a]ll plaintiffs have suffered * * * damages," including "diminutions in the fair market value of their properties." *Id.* at A131. Thus, because the only breach of which petitioners complain is the requirement that they go through the ELIHPA procedures—and because ELIHPA unambiguously imposed those procedures and unambiguously eliminated any unfettered right to prepay—the fact that ELIHPA to some degree preserves their ability to prepay does not somehow make petitioners' claims timely.[6]

In their motion for reconsideration in the Court of Federal Claims, petitioners for the first time submitted the affidavit of Phoebe Perri, upon which petitioners rely in their brief here. See Pet. Br. 47-49. Neither court below adverted to that affidavit. Because it was not offered until petitioners' motion for reconsideration in the trial court, and there was no reason it could not have been offered earlier, it should not be considered. See *White Mountain Apache Tribe* v. *United States*, 9 Cl. Ct. 32, 34 (1985) ("Courts are particularly unreceptive to factual assertions * * * that were available during initial briefing, but which surface on reconsideration."); see also *Frietsch* v. *Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995) (refusing to consider affidavit submitted for first time with motion for reconsideration of decision granting motion to dismiss). In any event, the affidavit simply states that the affiant tendered prepayment and that it was denied; it does not assert that the affiant went through the ELIHPA process, including offering the property to nonprofit organizations.

[6] Moreover, even the provision of ELIHPA permitting prepayment on which petitioners place their primary reliance (Br. 34) requires not merely that the FmHA make certain findings regarding the adequacy of the stock of low-income housing before permitting prepayment, but also that "sufficient actions have been taken to ensure that the rental housing will be made available to

D. The Court Of Appeals' Result Is Supported Both By The Purposes Of The Anticipatory Repudiation Doctrine And By Those Of Section 2501

1. The conclusion that petitioners' claim accrued when ELIHPA was enacted is reinforced by the underlying purposes of the anticipatory repudiation doctrine. Petitioners themselves explain (Pet. 23) that, in the ordinary case in which a statement by a private individual is treated as an anticipatory repudiation, "[a]llowing the obligee to defer suit until the time for performance arrives provides the obligor an opportunity to retract its wrongful repudiation and perform as promised, thereby eliminating the need for a lawsuit." Professor Corbin similarly explained that the doctrine is based on the principle that "[t]he plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and he would be so penalized if the statutory period of limitation is held to begin to run against him immediately." 4 *Corbin on Contracts*, *supra*, § 989, at 967; see Pet. Br.

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each tenant upon displacement." 42 U.S.C. 1472(c)(5)(G)(ii)(II). See also 7 C.F.R. 1965.215 (detailing procedures). There is no provision of ELIHPA that gives petitioners an unfettered right to prepay. Moreover, even if ELIHPA is only a partial breach of the government's promise of unfettered prepayment rights, such a partial breach commences the statutory limitation period. See 2 C. Corman, *Limitation of Actions* § 6.1, at 376-377 (1991) ("Because a cause of action subsists when the right exists to demand compensation for injury done to person or property, no matter how slight that injury, it is reasoned that the suit can be instituted at once even though the full amount of damages is not yet apparent."); see also *Kinsey*, 852 F.2d at 558 (statute begins to run immediately if "the breach is not wholly anticipatory because it involves some contractual nonperformance") (citing 18 W. Jaeger, *Williston on Contracts* § 2027B, at 796 (3d ed. 1978)); 4 A. Corbin, *Corbin on Contracts* § 989, at 967 (1951)).

24 (quoting Corbin). That is the correct rationale for the doctrine.

That rationale, however, does not apply when Congress, as here, enacts a law that precludes performance. A repudiating party—whether a private individual or a federal contracting officer—may have an opportunity to reconsider when the alleged repudiation is simply a communicated intent not to perform a contractual obligation. Despite any such communication, the promisor on the contract, whether private or governmental, remains free to change its mind and render the requisite performance. But when an intervening Act of Congress precludes performance, the contracting officer is not free to reconsider. The breach is unequivocal.

The terms of ELIHPA at issue here illustrate that point. The provisions of ELIHPA applicable to FmHA loans are the law of the land; they are not open to reconsideration by FmHA. Nor are the provisions temporary. Indeed, the court of appeals rejected petitioners' argument—not renewed in this Court—that no final breach occurred until the 1992 legislation, because congressional findings at the time ELIHPA was enacted in 1988 referred to "interim measures." The court of appeals correctly explained that, "while this language indicates that parts of ELIHPA were 'interim measures,' the section relating to FmHA loans was *wholly permanent*." Pet. App. A13 (emphasis added). In this respect, the provisions applicable to FmHA loans contrasted with other ELIHPA provisions, applicable to HUD-insured loans, that had a two-year sunset provision. *Ibid.*; see *id.* at A5-A6 (discussing time limit on HUD-insured loans). The enactment of ELIHPA immediately and permanently prevented the FmHA

from performing its alleged obligations under the contractual language at issue.[7]

2. The conclusion that petitioners had six years from the enactment of ELIHPA in 1988 to file suit also is supported by the purposes of Section 2501 and this Court's cases First, Section 2501 provides plaintiffs with a generous six years from when the action "first accrues." Here, petitioners clearly could have sued immediately after the passage of ELIHPA. Whatever rights petitioners might have to sue long after an action *against a private party* based on a *non*-legislative statement of intent to repudiate would have "first accrued," the plain language of Section 2501 limits petitioners to six years after the passage of ELIHPA under the circumstances here.

The underlying purpose of Section 2501 and its role as a waiver of sovereign immunity further support the conclusion that petitioners had six years to bring their challenge to ELIHPA. When Section 2501 was enacted in 1863, see Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767, the House Report emphasized not merely the substantial importance of statutes of limitations generally, but also the centrality of a strictly construed limitations

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[7] Other cases in related areas confirm that a statutory limitations period may commence at the time a cause of action may first be brought, even if that would prevent the plaintiff from waiting to determine whether the defendant would change its mind before filing suit. In *Delaware State Coll.* v. *Ricks*, 449 U.S. 250 (1980), and *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (per curiam), public employees were informed that they had been denied tenure and that their employment would terminate at a particular date in the future. The Court held in each case that the applicable limitation periods on the plaintiffs' civil rights claims ran from the date they had been informed of the challenged action, not the date on which their employment was actually to terminate.

period to the overall purpose of permitting claimants to sue the government. The Report stated:

> All claims against the government are barred unless prosecuted in six years. We think this provision highly important to the government. A man who neglects his business for six years cannot complain of the government for refusing his suit; and *there is no doubt that a statute of limitation is even more demanded in justice to the government than it is to private individuals.*

H.R. Rep. No. 34, 37th Cong., 2d Sess. 3 (1862) (emphasis added). That is fully in accord with this Court's historic recognition that conditions on waivers of sovereign immunity, specifically including those found in statutes of limitations, must be construed strictly. See p. 15, *supra*; *Soriano* v. *United States*, 352 U.S. 270, 276 (1957) (applying that principle to Section 2501). Petitioners had an ample six-year period in which to bring their claims. They waited, however, nine years or more to do so, and now claim that they could have waited decades longer. Having "neglected their business for six years," they "cannot complain of the government for refusing [their] suit." H.R. Rep. No. 34, *supra*, at 3.

Petitioners argue that they were entitled, at their sole discretion, to wait as long as they wished—perhaps for decades, until near the expiration of their 40-year or 50-year mortgages—to bring suit on their claim that ELIHPA constituted a breach of their contract. In *McMahon* v. *United States*, 342 U.S. 25 (1951), this Court rejected a similar claim in the context of an analogous statute of limitations applicable to actions against the government. Under the claimant's theory in that case, "he would have it in his power, by delaying

* * * filing, to postpone indefinitely commencement of the running of the statute of limitations and thus to delay indefinitely knowledge by the Government that a claim existed." *Id.* at 27. The Court rejected that theory, stating that it "cannot construe the Act as giving claimants an option as to when they will choose to start the period of limitation of an action against the United States." *Ibid.* The same principle is applicable here. As in *McMahon*, adoption of petitioners' argument that their claims do not first accrue until they subjectively decide to prepay would effectively cede the jurisdiction of the Court of Federal Claims, and the extent of the congressional waiver of sovereign immunity, to petitioners.

E. This Court's Decision In *Mobil* Does Not Support Petitioners' Claim That ELIHPA Was An Anticipatory Repudiation

Contrary to petitioners' claims (Br. 24-28), this Court's decision in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000), provides no support for their argument that ELIHPA was an anticipatory repudiation, rather than a breach. In *Mobil*, plaintiffs held leases with the government under which they possessed certain qualified rights to drill for oil and/or gas in the outer continental shelf. By their terms, the leases were subject to certain statutes and regulations requiring the lessees to obtain regulatory approvals before drilling. *Id.* at 609. After plaintiffs had executed the leases, Congress passed the Outer Banks Protection Act (OBPA), Pub. L. No. 101-380, § 6003, 104 Stat. 555, which added additional regulatory approval requirements beyond those set forth in the statutes and regulations to which the lessees agreed to be subject. 530 U.S. at 611. The Court accordingly

"conclude[d] that the Government violated the contracts." *Id.* at 618.

Mobil has no relevance to this case. First, neither the date of accrual of plaintiffs' claims nor the statute of limitations was at issue in *Mobil*. OBPA had been enacted in 1990, and the lawsuit was commenced in 1992. See 530 U.S. at 611, 612. Accordingly, the plaintiffs' claims were well within the statute of limitations, and the Court had no occasion to consider the date on which their action accrued or to apply the principle of strict construction of waivers of sovereign immunity.

Second, the Court in *Mobil* did not in fact determine whether there had been an anticipatory repudiation or a present breach in that case, but instead referred to the statute at issue disjunctively as either anticipatory or a present breach. See 530 U.S. at 608 ("[I]f the Government *said it would break*, or *did break*, an important contractual promise, * * * then * * * the Government must give the companies their money back [as restitution].") (emphasis added); accord *id.* at 614 (noting that the government "concedes, as it must, that relevant contract law entitles a contracting party to restitution if the other party 'substantially' *breached a contract* or *communicated its intent to do so*") (emphasis added). The Court interchangeably labeled the statute a "violation," a "breach," and a "repudiation" throughout its opinion. See, *e.g.*, *id.* at 618 ("We conclude * * * that the Government violated the contracts."); *id.* at 621 ("The breach was 'substantia[l],' depriving the companies of the benefit of their bargain."); *id.* at 620 (referring to "repudiation").

Third, and related to the above, the Court in *Mobil* had no occasion to address the distinction between an anticipatory repudiation and a present breach because nothing in that case turned on the differences between

them. Petitioners argue in a footnote (Br. 25 n.29) that "[t]he Court's conclusion [in *Mobil*] that the legislation constituted a repudiation of the contracts at issue, as opposed to a full breach, was key to its holding that * * * restitution was available." That contention is wrong, because, as the Restatement of Contracts explains, restitution "is available [to the injured party] regardless of whether the breach is by non-performance or by repudiation." 3 Restatement (Second) of Contracts § 373, Cmt. a (1979). Indeed, on the very page of the *Mobil* opinion cited by petitioners, the Court gave a single example of the circumstances when restitution is available. That example—derived from the Restatement—is clearly an example of present breach, not repudiation; it provides that restitution is available if "A contracts to sell a tract of land to B for $100,000" and "[a]fter B has made a part payment of $20,000, A wrongfully refuses to transfer title." 530 U.S. at 608.

Because either repudiation or a present breach would support restitution, *Mobil* can be understood as concluding that because there was at least a repudiation, there was no reason to go further and inquire whether the OBPA effected an outright breach. In short, *Mobil* had to do with whether the government had fulfilled its contractual commitments; it had nothing to do with—and did not decide any question concerning —the date of accrual of a claim or whether the statute in that case was an actual breach or an anticipatory repudiation.

F. Petitioners' Other Arguments Should Be Rejected

1. Petitioners argue (Br. 29-30) that the court of appeals failed to recognize ELIHPA as an anticipatory breach because that court erroneously held that "FmHA's only duty under the contracts was to

"continue to allow petitioners to prepay," when, in fact, "FmHA's obligation was to accept prepayment requests made by owners." The court of appeals did not distinguish between a duty to allow petitioners to prepay and a duty to accept tendered prepayments, and any such distinction would be without significance. The language cited by petitioners, in context, simply made the point that the prepayment clause did not require any government performance besides permitting petitioners to prepay at any time; it nowhere stated that the government did not have a contractual duty to accept a properly tendered prepayment and thereafter take steps to remove any encumbrances on the borrowers' property.

In any event, petitioners' reliance upon a duty to accept prepayment misses the point. The language of petitioners' loan documents focused upon the borrowers' discretion, and the government's duty under this language was to allow that discretion throughout the term of the contract, which, of course, included permitting (and accepting) prepayment if tendered. By imposing restrictions upon the prepayment option, ELIHPA effected, under petitioners' theory, an immediate breach of the only relevant contractual term —regardless of whether that is phrased in terms of petitioners' unfettered right to prepay or the government's obligation to accept any prepayment tendered.

2. Finally, petitioners argue (Br. 21) that the court of appeals "exempted the government from standard contract law principles." For the reasons given above, that is not correct. This Court has never held that a statute enacted by Congress has the same effect as a statement by an individual—governmental or private —of an intent not to perform a contractual obligation.

Any such conclusion would be mistaken, for two reasons.

First, this Court has never suggested that a statute of limitations that is a condition of waiver of the government's sovereign immunity should be construed under precisely the same principles as a statute of limitations applicable to private parties. To the contrary, the Court has made quite clear that conditions on waivers of sovereign immunity—including the specific limitation provision found in Section 2501—must be strictly construed, to ensure that it is Congress rather than the courts that authorizes the government's liability.

Second, a statute simply cannot result in an anticipatory breach of a contract not involving the government. A statute can make performance of a private contract impossible, but it cannot embody a private party's intent to repudiate a contract. Accordingly, the search for an exact analogy in the law of private party contracting is futile. This is a special situation that arises only when the government is a contracting party. The special considerations that underlie sovereign immunity and the text of Section 2501 provide ample support for a rule that does not allow a party to challenge an Act of Congress at any time during a 40-50 year mortgage.

II. PETITIONERS' CLAIMS UNDER THE JUST COMPENSATION CLAUSE ALSO ACCRUED UPON ENACTMENT OF ELIHPA

Petitioners claim that the government has taken their property without just compensation, in violation of the Just Compensation Clause of the Fifth Amendment. It is highly doubtful that any such claims are viable, because such claims are not distinct from petitioners' contract claims and because compensation for

any breach would in any event provide sufficient "just compensation."[8] But, even if petitioners had viable claims for just compensation, those claims are at least entirely parasitic on their claims of breach of contract, in the sense that petitioners could show that there had been a taking only if they could show that there was a breach of contract as well. In those circumstances, the constitutional claims, if any, must have accrued on the same date as the contract claims. Both courts below therefore properly held that petitioners' taking claims are time-barred for the same reasons as are their contract claims.

1. Petitioners' claims under the Just Compensation Clause are entirely parasitic on their contract claims, in the sense that the government could not be found to have taken their property unless it breached their contracts. In their contracts with the government,

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[8] The government's failure to perform under a contract is a breach, not a taking, even if the contract has to do with real property. See, *e.g.*, *Sun Oil Co.* v. *United States*, 572 F.2d 786, 818 (Ct. Cl. 1978) ("[I]nterference with * * * contractual rights generally gives rise to a breach claim not a taking claim."); *Transpace Carriers, Inc.* v. *United States*, 27 Fed. Cl. 269, 274 (1992) (same); *Marathon Oil Co.* v. *United States*, 16 Cl. Ct. 332, 338 (1989) ("The clear thrust of the authorities * * * is that where the government possesses property under the color of legal right, as by an express contract, there is seldom a taking in violation of the fifth amendment."). Even if that failure were a taking, however, the contract damages available in the Court of Claims for breach of contract would be sufficient to provide just compensation to petitioners. Cf., *e.g.*, *Lujan* v. *G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) ("Though we assume for purposes of decision here that G & G has a property interest in its claim for payment, * * * it is an interest * * * that can be fully protected by an ordinary breach-of-contract suit."); *Home Sav. of Am.* v. *United States*, 51 Fed. Cl. 487, 494-496 (2002).

petitioners agreed to encumber their property and to use it in certain ways for so long as their loans were outstanding. If the government did not breach their contracts, then petitioners could have no taking claim; they could not complain that the government has taken their property when they themselves agreed to the restrictions upon its use and received (and continue to receive) consideration for that agreement.[9] Thus, the only conceivable taking claim that petitioners could assert would be entirely dependent on a showing that the government had breached their contracts.

Because the validity of any taking claims would be entirely dependent on whether the government had breached its contracts with petitioners, any taking claim that was viable would have to accrue at the same time—and be time-barred at the same time—as the contract claim. Common sense and the interest in orderly proceedings support that result. To hold otherwise would, in petitioners' terms, create truly "unworkable and illogical rules." Pet. Br. 46. A plaintiff who failed to file a timely claim for breach of contract would be able to revive the claim simply by pleading it as a taking claim. In other words, petitioners are correct (Br. 47) that requiring two suits to be brought at two separate times "would generate immense judicial inefficiencies by requiring courts to address the same facts and issues in separate suits that could be brought years, even decades, apart." Thus, where a taking claim (if it

[9] Petitioners suggest (Br. 6-7) that they received virtually no benefits from their participation in the Section 515 program. That contention has nothing to do with the statute of limitations question before the Court in this case. In addition, petitioners' contention is incorrect. Petitioners concede that their loans are at very low effective interest rates. See Pet. Br. 7 n.10. They also concede that they received substantial tax benefits. See Pet. Br. 5 n.8.

exists at all) is entirely parasitic on a contract claim, the two should be held to first accrue at the same time.

2. The court of appeals' holding that the contract and taking claims accrued at the same time is consistent with this Court's precedent. Petitioners rely (Br. 39) on regulatory taking cases in which this Court has held that a taking claim "based on a statute or regulation that allows for an agency decision on the scope of permissible use of the property at issue is not ripe for review until the agency renders a decision." None of the cases on which petitioners rely, however, had anything to do with a taking claim that was parasitic upon —or, indeed, in any way related to—a breach of contract claim.

Petitioners cite (Br. 40), for example, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In that case, the plaintiffs alleged that a federal statute, if construed to limit the use of their land, would constitute a taking. The Court stated that "[t]he mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking," because "[o]nly when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *Id.* at 126, 127. In *Riverside Bayview*, however, the plaintiffs had never agreed, in a contract or otherwise, to the restrictions of which they complained, and the viability of their taking claim thus had nothing to do with any contract claim.

Similarly, in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981), the Court rejected a claim by owners of coal mining lands that the mere enactment of a statute limiting their mining activities constituted a taking of their property. There was no allegation in *Hodel* that the plaintiffs had

ever agreed to the limitations embodied in the statute, and, again, the viability of their taking claim had nothing to do with any contract claim.

In short, each of the cases upon which petitioners rely involved alleged takings of real estate interests separate and apart from any contractual relationship with the government. The rules applicable to the accrual of such claims have little to do with the rules applicable to accrual of taking claims such as those at issue here, which—insofar as they are viable at all—are at least entirely dependent on the breach of the promises embodied in petitioners' contracts.

3. Petitioners contend (Br. 44-45) that they have distinct taking claims that could have accrued independently of their contract claims, because they did not claim a taking of their contractual rights, but a taking "of their state-created real estate interests." They identify (Br. 45 n.48) those "real estate interests" as "the right to economically productive use and enjoyment, the right to exclusive possession, and the rights to transfer, devise, and dispose of their properties." But the precise terms in which petitioners pleaded their claims make no difference for present purposes. Any limits on the use of their properties were granted by petitioners in their loan agreements. Thus, as noted above, if the government has not breached those agreements, there has been no taking. If the government has breached those agreements, then any taking claim remaining was likely eliminated by their opportunity to obtain damages for breach of contract. In any event, even if the taking claim were not eliminated, at the very least it had to have accrued at the time of the breach.

4. The court of appeals' decision does not conflict with its own prior decision in *Greenbrier* v. *United*

States, 193 F.3d 1348 (Fed. Cir. 1999), cert. denied, 530 U.S. 1274 (2000). In *Greenbrier*, the court held that the claims of owners of HUD-insured (but not HUD-financed) housing alleging that ELIHPA and other legislation effected a taking were not ripe because plaintiffs had not applied to the agency to prepay their loans. *Id.* at 1360. Unlike in this case, the plaintiffs in *Greenbrier* "were not in privity of contract with respect to the notes' prepayment," because the government was not a party to the prepayment provisions of the notes. *Id.* at 1355. Whatever private contracts they had signed concerning their prepayment rights were thus necessarily conditioned by the possibility of legislation that subjected their prepayment rights to some degree of government regulation. Because the plaintiffs claimed a "regulatory taking," see *id.* at 1357, their claim that their contract rights had been subject to a taking was not ripe until the precise restriction imposed upon their prepayment rights by the government regulation became clear.[10]

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[10] Even if petitioners had viable taking claims and those claims somehow did not have to be brought within six years of ELIHPA's enactment, they could not simply be brought at any time, without exhausting ELIHPA's procedures that may provide constitutionally just compensation. As petitioners themselves have emphasized (Br. 32-37), ELIHPA substitutes for an unfettered right to prepay a procedural mechanism that may result in the property owner receiving "fair market value" for the property, 42 U.S.C. 1472(c)(5)(A)(i), or being able to prepay. The procedures allegedly interfered with petitioners' alleged unfettered right to prepay, and petitioners' challenge therefore accrued upon enactment. But to the extent that petitioners try to base a taking claim on something beyond the very existence of those ELIHPA provisions, then under settled law they would have to exhaust the ELIHPA procedures before their claim is even ripe. Their complaints suggest

This case arises in the very different setting in which both petitioners and the government were parties to the contracts at issue, including the prepayment provisions. Unlike the plaintiffs in *Greenbrier*, petitioners obtained a clause in a loan agreement with the government granting them (in their view) an "unfettered right to prepay." That contract right differed substantially from the private contract right at issue in *Greenbrier*.[11] Accordingly, while the regulatory taking claim in *Greenbrier* was not ripe until the scope of the regulatory restriction on the private contract became clear, the taking claim in this case became ripe as soon as the government enacted ELIHPA, which itself eliminated petitioners' alleged contractual right to be free of government-imposed conditions upon their prepayments.

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that they have not done so. See Pet. App. A129, A152; see also note 4, *supra*.

[11] Petitioners' estoppel argument (see Pet. Br. 42 n.44) must be rejected, because the facts of *Greenbrier* (and therefore the government's argument in that case) were substantially different from those here. Judicial estoppel contemplates the existence of the same parties and facts as the case in which the previous argument was made. See *U.S. Phillips Corp.* v. *Sears Roebuck & Co.*, 55 F.3d 592, 596 (Fed. Cir.), cert. denied, 516 U.S. 1010 (1995). Petitioners do not cite a single case in which this theory has been applied against the government.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In the
Supreme Court of the United States

FRANCONIA ASSOCIATES, *et al.*,
Petitioners,

vs.

UNITED STATES,
Respondent.

GRASS VALLEY TERRACE, *et al.*,
Petitioners,

vs.

UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The government attempts to avoid liability in this case by asking this Court to adopt a number of unprecedented exceptions to well-settled principles of law. With respect to petitioners' contract claims, the government asserts that it should not be held to ordinary principles of contract law insofar as those principles touch upon the statute of limitations under 28 U.S.C. § 2501. With respect to petitioners' takings claims, the government advances a "parasite exception" to the ripeness requirement that would cause certain takings claims to accrue before they become ripe for judicial review. A straightforward application of this Court's precedent, however, demonstrates that petitioners' claims were filed in a timely manner.

I. Petitioners' Contract Claims Accrued When The FmHA Breached By Failing To Perform Its Contractual Obligations.

The major thrust of the government's opposition is that the standards governing the accrual of contract claims in disputes between private parties do not apply in contract actions brought against the government subject to 28 U.S.C. § 2501. Opp. 15-17, 28-30, 33-34. Despite this Court's repeated admonitions that the United States is subject to the same rules as private contractors (*see* Pet. Br. 21), the government asserts that § 2501 provides it refuge from the ordinary contract principles that otherwise would determine when a breach occurred in this case, triggering the statute of limitations on petitioners' claims.

A. Section 2501 Does Not Afford The Government Any Special Treatment With Regard To The Accrual Of Contract Claims Brought Against It.

1. The government first asserts that statutes of limitation applicable to claims against the government must be "strictly construed" because they involve a waiver of sovereign immunity. The bulk of the cases on which it relies

stand only for the proposition that the question *whether* the government has waived its sovereign immunity must be strictly construed. *See* Opp. 15. Here, the government has "unequivocally expressed" through the Tucker Act its consent to be sued for claims such as those before the Court. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980). The government cannot now cloak itself in sovereign immunity, having expressly waived its immunity from suit.

The cases purportedly applying this strict construction standard in the limitations context fare no better. The primary case on which the government relies, *Soriano v. United States*, 352 U.S. 270 (1957) (Opp. 15, 29), was overruled on the very point for which the government cites it. While the Court held in *Soriano* that the doctrine of equitable tolling had no place in suits against the government because of the strict construction given to waivers of sovereign immunity, the Court reversed that holding in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1991). In *Irwin*, the Court held that once the government has waived sovereign immunity, the equitable tolling doctrine should apply against the government "in the same way that it is applicable to private suits." *Id.* at 95.

Both the concurring justices in *Irwin* and subsequent cases have recognized that *Irwin* overruled the strict construction approach applied in *Soriano*. *See Irwin*, 498 U.S. at 98 (White, J., concurring) (noting that the majority had "directly overrule[d]" *Soriano*); *Stevens v. Secretary of the Dep't of Health and Human Svcs.*, 31 Fed. Cl. 12, 22 (1994) (noting that the doctrine set forth in *Soriano* was overruled by *Irwin*); *Glick v. United States*, 25 Cl. Ct. 435, 440 (1992) ("The jurisdictional concept relative to federal limitations statutes [as enunciated in *Soriano*] has been reexamined and modified."). [1] Thus, the current state of the law under *Irwin*

[1] The only other limitations case cited by the government for its "strict construction" rule, *United States v. Kubrick*, 444 U.S. 111 (1979), did not even purport to apply a more strict limitations standard to claims against the government. Rather, the Court simply attempted to discern congressional intent in the statute. *Id.* at 118. In doing so, the Court was mindful that while it should not interpret the government's waiver of immunity more broadly than Congress intended, it also should not "assume the authority to narrow the waiver that Congress intended." *Id.*

is that once the government has waived its immunity, it "stands in the same position as a private party" with respect to statute of limitations principles. *See Massard v. Secretary of the Dep't of Health and Human Svcs.*, 25 Cl. Ct. 421, 424 (1992).

Thus, the government's patchwork "strict construction" argument falls apart upon scrutiny. The case law establishes that limitations periods applicable to suits against the government should be construed in conformity with the standards applicable to private disputes. While the Court should not extend the government's waiver of immunity beyond that intended by Congress, "[n]either should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) (construing scope of waiver of sovereign immunity under Federal Tort Claims Act in light of the "broad and just purpose" of the statute to hold the government liable "in circumstances like unto those in which a private person would be liable").[2]

2. The government's arguments regarding the legislative history of § 2501 and its use of the word "first" (Opp. 16-17, 28-29) also are unpersuasive. The relevant history demonstrates that Congress intended to make the government answerable to claims against it according to the same limitations principles that apply in disputes between private parties—not to grant it more favorable treatment in that regard. *See* Cong. Globe, 37th Cong., 3rd Sess. 414 (1863)

[2] Even under a strict construction approach, the result would be no different in this case. A strict interpretation of § 2501 would essentially mean that no exceptions to the prescribed limitations period could be implied. *See Soriano*, 352 U.S. at 276. Here, petitioners do not request that the Court carve out any exception from the terms of the statute, but rather seek to have the statute applied according to its terms.

("As this bill proposes to throw open this court to all claimants, I think the same statute of limitations ought to be applied to existing claims as would be applied between private individuals.").[3] Any other interpretation would contravene the very purpose behind the creation of the Court of Claims, which was to ensure that the government would render prompt justice against itself according to the same principles that apply to private parties:[4]

> It is believed also that no better reason exists for exempting the government from prosecution for just claims against it than exists in the case of individuals. Its obligations to pay its debts and perform its contracts is quite as imperative as those which rest upon other parties amenable to the laws.
>
> * * *
>
> This assumption [that the government should have "special privileges" over individuals in its "legal rights and pecuniary obligations"] ignores entirely the well-settled principle that when the government enters into a contract, or engages in any pecuniary transaction with an individual, it to that extent divests itself of its sovereign character, and assumes that of a private citizen. Its rights, duties, and obligations are to be adjudged and considered in all respects and in all places precisely as if it were a private party; and when it approaches the altar of justice, and submits its rights to the jurisdiction of civil judges, it comes, in all respects, as an ordinary suitor. There is no law for the citizen, in respect to obligations of a pecuniary character, which the government is not bound to observe . . . .

H.R. Rep. No. 513, 36th Cong., 1st Sess. 2, 4-5 (1860).[5]

In addition, both the "first accrued" language and the six-year time period set forth in § 2501 mirrored contemporaneous state statutes of limitation applicable to disputes between private parties. *See* Angell, LIMITATION OF ACTIONS, App. xxxiv-clxxxvi (1876) (quoting state statutes of limitation). If Congress had desired that stricter limitations standards apply to the government under § 2501, it could have chosen a shorter time period or provided specific exceptions to the rules applied in other contexts. Instead, consistent with the rationale for the court's creation, Congress enacted a statute that put claims against the government on the same footing as private disputes.

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[3] The legislative history relied on by the government (*see* Opp. 29) is not to the contrary. The language quoted stresses the importance of ensuring that claims against the government are subject to *a* statute of limitations, but says nothing to indicate that the limitations period prescribed by Congress should be *applied* any differently than other statutes of limitation. *Id.* Further, the debates surrounding the limitations provisions principally focused on concerns about outdated civil war claims. *See* Cong. Rec., 49th Cong., 2nd Sess. 622 (1887). ("The committee was so anxious to exclude any possibility of war claims coming in under this bill, that we provided there should not be asserted under it any claim that had arisen more than six years prior to the time of its assertion. Therefore no claim which arose during the period of hostilities can come in under the bill."); Cong. Globe, 37th Cong., 3rd Sess. 418 (1863) (noting that these "old claims" were not previously subject to even "the ordinary statute of limitations" and "therefore, that it would be dangerous to pass this bill without some limitations, some restraint upon the power of the court over these old claims").

[4] The statute that created the court in 1855 did not even contain a statute of limitations. *See* Act of February 24, 1855, ch. 122, 10 Stat. 612. The court operated and heard cases for eight years before Congress decided in 1863 to add the six-year limitations provision at issue. *See* Act of March 3, 1863, ch. 92, § 10, 12 Stat. 765.

[5] *See also* H.R. Rep. No. 513, 36th Cong., 1st Sess. 2 (1860) ("The different position of the party on the record [*i.e.*, the United States as a defendant] works no change in the law, or in the capacity of the court to do justice . . . ."); H.R. Rep. No. 562, 49th Cong., 1st Sess. 4 (1886) ("It is to be regretted that this Republic of ours should refuse to open its courts to any of its citizens having just demands against the Government. The evils, delays, and injustice of examining and passing upon private claims resulted in the establishment of the Court of Claims to repress a mischief and to advance a remedy."); H.R. Rep. No. 562, 49th Cong., 1st Sess. 2 (1886) ("The citizen who has an honest claim against the Government should not thus be trifled with; it is a mockery of justice.").

There has never been any case applying § 2501 that has attached any significance to the word "first." *See* Williston § 2021A (stating "general rule" that the statute of limitations on a contract claim begins to run when the claim "first accrued"). It is telling that after nearly 150 years of jurisprudence in the Court of Claims, the government cannot point to a single case adopting its theory that the date of "first accrual" under § 2501 is different from the date that a claim against a private party "accrues."[6] Absent any clear expression of Congressional intent to the contrary, the Court should construe § 2501 in conformity with statutes of limitations governing disputes between private parties.[7]

B. A Breach Of Contract Does Not Occur Until The Time For Performance Arrives And The Promissor Fails To Perform As Promised.

No matter how strictly § 2501 is construed, it cannot be understood to mean that a contract claim accrues before a breach occurs. Thus, as the parties appear to agree, the key

[6] It is difficult to imagine that a claim could "first accrue" before it "accrues." The only context in which this difference in terminology might have some relevance is with respect to the tolling of disabilities for successive claimants. *See, e.g., Duke v. Thompson*, 16 Ohio 34, 44 (1847) ("for he is not the person to whom the right of action 'first' accrued. If every grantee of the person to whom the right of action accrues, during disability, were to be entitled to the benefit of the proviso, there might be successive disabilities for several centuries . . . ."). This rationale is consistent with the proviso regarding tolling for disabilities contained in § 2501 as originally enacted, which referred to the claims "of married women first accrued during marriage" and "of persons under the age of twenty-one years first accruing during minority." *See* Act of March 3, 1863, ch. 92, § 10, 12 Stat. 765; *see also* H.R. Rep. No. 562, 49th Cong., 1st Sess. 2 (1886) (expressing concern regarding claims "now prosecuted by the great-grandchildren of the original claimants").

[7] *See Irwin*, 498 U.S. at 95; Angell, LIMITATION OF ACTIONS 13-14 (1876) (despite "slight variations of phrase," statutes of limitation should be given a "uniform construction"); *see also Kubrick*, 444 U.S. at 119 n.6 (finding legislative history of FTCA uninstructive in that it failed to "explain how to determine the date of accrual").

to determining when petitioners' contract claims accrued is identifying the date of breach. *See* Opp. 17. The government asserts that a breach occurred on the day that Congress passed the 1988 legislation because the law "substituted" their contract rights with a "more limited and uncertain" right, thereby "imposing restrictions" on their ability to be freed from the program's regulatory covenants. Opp. 12, 21, 33. In essence, the government contends that petitioners' contract claims accrued when the law placed "fetters" on what it describes as a previously "unfettered" right to prepay. Opp. 18-21. Ordinary principles of contract law, however, dictate that petitioners' claims accrued, not when their rights were restricted or fettered, but when the government breached the contracts by failing to perform. Thus, the relevant inquiry, which the government attempts to obfuscate, is to determine what act constituted a *failure of performance* by the government, resulting in a breach that commenced the statute of limitations on petitioners' claims.

1. A breach of contract claim accrues for limitations purposes on the date of breach.[8] A breach, in turn, occurs only when the promissor fails to *perform* a present contractual duty.[9] As a result, there can be no breach until

[8] Corman, LIMITATION OF ACTIONS § 7.2.1 (1991) ("Corman") ("The cause of action for breach of contract accrues, and the statute of limitations begins to run, at the time of the breach, which consists of failure without legal excuse to perform contractual acts or promises."); Williston, CONTRACTS § 2027B (3d ed. 1978) ("Williston") ("no action on the contract can be maintained until the time when the defendant's performance becomes due according to the terms of his promise; and the Statute should not begin to run until then").

[9] Restatement (Second) of Contracts § 235(2) (1981) ("Restatement") ("breach" requires "non-performance"); Corman § 7.2.1; Williston § 2027B; Corbin, CONTRACTS § 943 (1951) ("Corbin") ("A breach of contract is always a non-performance of duty . . ."); Gifis, LAW DICTIONARY 54 (3d ed. 1991) ("Gifis") (defining "breach" as "a party's failure to perform some contracted-for or agreed-upon act"); Angell, LIMITATION OF ACTIONS 14-15 (1876) ("Angell") (statute of limitations prescribes time period for commencement of action "for the non performance of a contract").

the time for performance under the contract arrives and the promissor fails to perform as promised.[10]

The principle that a contract claim cannot accrue until the time for performance arrives is best illustrated in cases where there exists some condition precedent to the promissor's duty to perform. [11] In such a case, there can be no failure of performance, and thus no breach, unless and until the condition occurs.[12] In cases involving a contractual

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[10] Restatement § 235 cmt. b ("Non-performance is not a breach unless performance is due."); Corbin § 943 ("failure to render the performance promised will not be a breach of contract unless the time fixed for such performance has expired and all conditions precedent have occurred"); Farnsworth, CONTRACTS § 8.8 (1990) ("Farnsworth") ("when performance is due. . . failure to render it is a breach"); Angell at 14-15 ("The difference between the obligation of a contract, and the remedy to enforce it, is that they originate at different times. The obligation to perform is coeval with the making of the contract, and operates anterior to the time of performance. The remedy, on the other hand, cannot be applied to a contract until it is broken; and then it is applied to enforce a pre-existing obligation.").

[11] A condition is "an event, not certain to occur, which must occur . . . before performance under a contract becomes due." Restatement § 224; Farnsworth § 8.2; *see also* Murray, CONTRACTS § 99(B) (1990) ("Murrray") (condition must occur "in order to *activate* an existing contractual duty."); Williston § 663; Corbin, *Conditions in the Law of Contracts*, 28 Yale L.J. 739, 743 (1919); BLACK'S LAW DICTIONARY 288 (7th ed. 1999) (defining "condition" as a "future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance"); Gifis at 87 (defining "condition precedent" as "a fact (act or event) which must exist or occur before a duty of immediate performance of a promise arises").

[12] Farnsworth § 8.2 ("The obligor need not render performance until the occurrence of the event on which the obligor's duty is conditioned."); *id.* § 8.8; Corbin § 943; Wood, LIMITATION OF ACTIONS § 119 at 629-31 (4th ed. 1916) ("the cause of action does not arise until the condition has been accomplished or the precedent act performed.). Where such a condition exists and has not been fulfilled, a cause of action will not accrue even if the plaintiff has suffered damages. *Hermanowski v. Acton Corp.*, 580 F. Supp. 140, 144 (E.D.N.Y. 1983), *aff'd in relevant part*, 729 F.2d 921 (2d Cir. 1984); Williston § 2021A at 698-99, 701 (noting that "a cause of action may not accrue until long after damage has been caused . . . if the law or the

option, for example, the tender of the option by the promissee constitutes a condition precedent to the promissor's duty to perform by accepting the tender.[13] As a result, if the promissee never attempts to exercise the option, no duty of performance on the part of the promissor will ever arise, and no breach of contract will ever occur.

2. Under this indisputable precedent, the enactment of the 1988 legislation could qualify as a breach of contract only if it amounted to a failure by the government to *perform* under the contracts at issue. While the government argues that any breach was complete upon the enactment of the law by Congress, it fails to explain how this legislative act amounted to a "failure to perform." Ignoring the central question of performance, the government focuses on the alleged impact of the restrictions imposed by the law on petitioners' rights. Opp. 19-21, 33. In particular, the government argues that because the legislation's prepayment restrictions allegedly altered petitioners' rights, rendering it less likely that the FmHA would grant any request to prepay, the breach occurred immediately upon the enactment of the law. *Id.*

The government's approach misses the mark. A breach occurred under the contracts at issue not when petitioners' rights were allegedly altered, but when the government failed to perform a present duty of performance. *See supra*

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contract imposes a condition precedent to the right to bring the action and the condition has not been satisfied"); *see also* 2 Bouvier, LAW DICTIONARY 57 (1868) ("The breach of the contract is the gist of the action, and not the damages resulting therefrom.").

[13] Corbin § 638 (identifying "ordinary option contracts" as an example of a contract containing a condition precedent "within the volitional control of the promisee"); *Saewitz v. Epstein*, 6 F.Supp.2d 151, 157 ("the actual exercise of an option contract by the optionee is the performance of a condition precedent to the optionor's duty to perform"); *see also Lucente v. IBM Corp.*, 146 F.Supp.2d 298, 315-16 (S.D.N.Y. 2001) ("date of breach" of option contract was date that defendant "rejected plaintiff's exercise [of the option] and returned the check").

n.9, 10. Having failed to identify any failure of performance that occurred upon enactment of the 1988 legislation, the government cannot assert that the law constituted a breach. Indeed, Congress assumed no performance obligations under petitioners contracts that it could have failed to perform by passing a law. Only the FmHA, the agency with whom petitioners contracted, assumed performance obligations to petitioners. Thus, without some adverse action by the FmHA, the 1988 legislation could not have amounted to a failure by the government to perform as promised. As a result, the passage of the law was not a "breach" that could have triggered the statute of limitations.

3. As petitioners explained in their opening brief, the FmHA's obligation under the subject contracts was to accept prepayment requests submitted by petitioners. Pet. Br. 29-31. Thus, the failure of performance upon which their claims are based is the FmHA's failure to grant their requests to terminate their participation in the Section 515 program. App. 129, 132-33. This failure of performance could not have occurred until each petitioner attempted to prepay. Only then did the time for performance by the agency under each contract arrive. In this manner, the tender of a request to terminate serves as a condition precedent that "activates" the FmHA's obligation to perform its duty of acceptance. *See* Farnsworth, *supra* n.11.

The government no longer contends, as it did before the courts below, that the FmHA had no duty to accept owner requests to prepay. Opp. 35-36.[14] Having admitted that the

[14] In making this admission, the government retreats from the Federal Circuit's holding that the "prepayment provision did not require any performance on the part of the government." App. 10. Although the government now denies that the court of appeals held that the government had no duty to accept termination requests tendered by owners, the language of the Federal Circuit's decision is clear. *Id.* Further, the court's holding affirmed the trial court's finding that:

FmHA did in fact have a contractual obligation to accept requests to prepay, the government cannot escape the conclusion that the time for performance did not arrive, and thus no breach occurred, until each petitioner attempted to terminate its participation in the program and was rejected by the agency. *See* Pet. Br. 29.

4. The government's argument that the legislation amounted to a breach because it "eliminated" petitioners' contract rights also must fail. Indeed, the 1988 legislation did not even attempt to "eliminate" the central right at issue here, *i.e.*, petitioners' right to terminate their participation in the program and thereby gain freedom from the regulatory covenants set forth in their loan agreements. The statute is directed only to the FmHA's authority to accept prepayment requests and requires the agency to grant such requests in specified circumstances. Pet. Br. 11-12. As a result, the agency's promised performance—to release petitioners from the program upon their request—can occur even under the new scheme created by Congress.[15] Thus, the statute cannot possibly be understood to "eliminate" petitioners' rights.

The only right that the government points to as having been "eliminated" by the statute is what it calls an "unfettered right to prepay" (a phrase that find finds no source in petitioners' pleadings). Opp. 12, 18. According to

> no performance by the government is required—it is merely a promise *to allow* the borrower to prepay.... The government's performance, if it can be called that, is to keep its promise *to allow* borrowers an unfettered prepayment right. No further performance was required by the government...." App. 31 (emphasis added).

[15] Thus, the government is simply wrong in asserting that the 1988 legislation "immediately and permanently prevented the FmHA from performing" under the parties' contracts. Opp. 12, 27. To rebut this factual assertion, petitioners have lodged with the Court publicly available documents establishing that in fiscal years 1999 and 2000 alone, hundreds of housing units in the Section 515 program have been released from the program upon the owners' requests. *See* Letter from J. Eckland to D. McNerney (April 4, 2002).

the government, this right was eliminated by the legislation because the restrictions imposed by the law rendered that right no longer "unfettered." Thus, the point of the government's analysis is simply that the legislation fettered, or conditioned, the terms under which the agency would perform its contract obligations. Such an imposition of extra-contractual conditions on the terms of one's future performance, however, is the classic definition of a repudiation, *not* a breach. Pet. Br. 26.

The government again misstates petitioners' pleadings by asserting that the breach of which they complain is the 1988 legislation's imposition of new procedures and conditions on prepayment. Opp. 24-25, n.5. Petitioners never alleged that the mere enactment of the statute or the mere existence of the modified prepayment process constituted a breach.[16] Rather, petitioners' breach claim is premised on the agency's implementation of the statutory conditions to deny their termination requests brought pursuant to the statue. App. 126-29.[17] Thus, it was not the existence of those conditions, but rather the agency's failure of performance through its enforcement of the conditions, that constituted a breach.

C. This Court Has Soundly Rejected The Government's Argument That Legislation Can Never Amount To A Repudiation.

1. The government asserts that legislation could never constitute an anticipatory repudiation of the government's contract obligations. Opp. 12, 23-24, 27. This argument is

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[16] Indeed, in the event that the agency grants a prepayment request under the 1988 legislation, any "breach" based solely on any additional delays or costs caused by the new conditions would be inconsequential and would constitute, at most, an immaterial breach.

[17] Contrary to the government's assertion that petitioners have not alleged that they complied with the 1988 legislation's procedures (Opp. 24-25 n.5), petitioners have pled that they attempted to prepay pursuant to the 1988 legislation and were denied. *See* App. 129 ¶ 41.

disposed of by this Court's decision in *Mobil Oil Exploration & Producing SE, Inc. v. United States*, 530 U.S. 604 (2000). There, the Court held that a statute announcing that the government would no longer honor the terms of lease contracts entered into with oil companies constituted a "repudiation" as defined by the Restatement (Second) of Contracts § 250: "a statement by obligor to the obligee indicating that the obligor will commit a breach." 530 U.S. at 608, 619 ("if legislation passed by Congress and signed by the President is not a 'statement by the obligor,' it is difficult to imagine what would constitute such a statement").

Respondent denies that the Court held that the legislation at issue in *Mobil* constituted a repudiation of the contracts, stating that the decision could be construed as holding that the statute effected an immediate, rather than prospective, breach. Opp. 31. However, one need only read the opinion and the language of the Restatement § 250 to see that the case cannot reasonably be understood as the government suggests. The Court began by explaining the contract principles regarding repudiation and then held that the legislation at issue constituted just such a repudiation under the Restatement. *Id.* at 608, 619-21. Although the Court acknowledged that the government ultimately *may have* breached the contracts, it consistently described the *legislation* as a "repudiation," *i.e.*, a "statement" of the government's "intent" to breach the contracts. *Id.* at 619, 620, 621. The Court's introductory remarks leave no doubt as to its holding: "We agree that the Government broke its promise; it *repudiated* the contracts; and it must give the companies their money back." *Id.* at 607 (emphasis added).

The government also asserts that nothing in *Mobil* turned on whether the statute at issue was an anticipatory repudiation or an actual breach. Opp. 31-32. However, the Court's holding that the legislation at issue constituted a repudiation under the Restatement § 250 was key to its holding that the contractors were entitled to restitution

under Restatement § 373. *Id.* at 608, 624 (holding that restitution is available "upon repudiation"). Indeed, as the government points out, the Court never determined whether the contracts at issue were ever breached. Opp. 32. Thus, unless the Court had determined that the legislation amounted to a repudiation, it would not have had any basis for concluding that "the Government must give the companies their money back." *See* 530 U.S. at 624.

2. The government suggests that the only government action that could qualify as a repudiation would be a statement by an agency official. Opp. 12, 27. Aside from the inconsistency of this argument with *Mobil*, a legislative act possesses all the salient features of a repudiation by a private party. While the government asserts that Acts of Congress differ because they are "unequivocal" (Opp. 27), it is in fact a requirement of the anticipatory repudiation doctrine that the repudiation be "unequivocal." *Dingley v. Oler*, 117 U.S. 490, 502 (1886). Further, while a statute might definitively "preclude performance" (Opp. 27), a repudiation similarly exists where a party "puts it out of his power to perform," rendering performance "impossible." *Taylor v. Johnston*, 539 P.2d 425, 430 (Cal. 1975); Corbin § 984. Finally, a legislative repudiation, just like a repudiation by a private party, can be retracted, as demonstrated by the fact that the government's initial repudiation of the contracts at issue through the 1979 legislation was retracted through the repeal of that law in 1980. *See* Pet. Br. 27.

3. Although the government asserts that the doctrine of anticipatory repudiation is wholly inapplicable to this case, it attempts to enforce a cannibalized version of the doctrine against petitioners. The government asserts that because the doctrine provides that petitioners *could have* sued upon the enactment of the 1988 legislation, their claims *must* be deemed to have accrued at that time. Opp. 21-22. The doctrine of anticipatory repudiation, however, stands as an exception to the general rule that one cannot sue for breach

until an actual breach occurs. It allows the promissee, for policy and economic reasons, to sue before a breach claim has accrued for limitations purposes. Pet. Br. 23, 28 n.32.[18] Indeed, the law recognizes many situations in which a plaintiff can sue before its claim has "accrued" for limitations purposes. As the court held in *Nager Elec. Co. v. United States*, 368 F.2d 847, 857 n.17 (Ct. Cl. 1966), "[t]here is nothing incongruous in a rule that suit *can* (but need not) be filed on an item before the limitation period commences."[19] *See also Kossick v. United States*, 330 F.2d 933, 936 (2d Cir. 1964) ("Courts have long since rejected the mechanical concept that in all cases the limitations period necessarily starts at the very moment that a suit can be brought.").

In addition, the anticipatory repudiation doctrine did not even exist in the United States in 1863 when § 2501 was enacted. The doctrine finds its origin in the English case of *Horchster v. De la Tour*, 118 Eng. Rep. 922 (Q.B. 1853), and did not attain general acceptance in the United States until after the Supreme Court's decision in *Roehm v. Horst*, 178 U.S. 1 (1900), decided nearly forty years after § 2501 was enacted. *See* Rowley, *A Brief History Of Anticipatory Repudiation In American Contract Law*, 69 U. CINN. L. REV. 565 (2001). Thus, the "first accrued" language of § 2501 cannot reasonably be

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[18] Thus, the government attempts to rely on the component of the doctrine that permits a plaintiff to sue upon the repudiation but ignores the component of the doctrine recognizing that the statute of limitations does not *accrue* at that time because no breach has yet occurred. This selective incorporation of the doctrine, if accepted, would undermine its very purpose, which is to provide parties the *option* to file suit before the time for performance has arrived. Pet. Br. 23.

[19] In *Nager*, the court held that although the six-year limitations period on the plaintiff's claim would not begin to run until a mandatory administrative proceeding was completed, the plaintiff was nonetheless permitted to file suit before that time if it so desired. *Id.* (holding that "our rule has been that the time-bar will not fall until six years after the administrative determination, but suit can be filed earlier"). Another example of a situation where a party can file suit before its claim has "accrued" for limitations period is a declaratory judgment action.

construed to require owners to sue upon a repudiation—something that the courts of the United States did not even recognize at the time. The general contract law in existence in 1863 provided that a claim for breach of contract accrues when the breach occurs, which is the precisely rule that petitioners advocate here.

D. The Standard Accrual Principles Advanced By Petitioners Provide Certainty And Are Consistent With The Terms Of The Parties' Agreements.

The government also asserts that the time period within which the government might be subject to liability if petitioners prevail is simply too long and subject to too much discretion by petitioners. Opp. 29-30, 34. However, any such discretion on petitioners' part is a direct result of the terms of the parties' contracts. The contracts granted petitioners the option to prepay "at any time" during their full mortgage terms. Having agreed to perform under a contract containing a forty to fifty-year option provision, the government cannot complain that it might be held liable for breach it if fails to perform at any time during that period.[20]

The government's reliance on *McMahon v. United States*, 342 U.S. 25 (1951) in this regard is misplaced. The Court held in *McMahon* that the accrual of the plaintiff's admiralty action alleging "negligence and unseaworthiness" need not await the plaintiff's compliance with an optional administrative procedure.[21] *Id.* at 25, 27. Thus, the Court concluded

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[20] Indeed, the very nature of an option is that it grants the holder with the authority to decide when it will demand performance under the contract. *See Hermanowski*, 580 F. Supp. at 143; *Fullington v. M. Penn Phillips Co.*, 395 P.2d 124 (Ore. 1964). An option granted by the government should be treated no differently.

[21] Because the plaintiff was not required to begin the administrative process within any particular time frame, the Court observed that a rule delaying the accrual of the plaintiff's action until the administrative process was complete would permit the plaintiff to defer suit indefinitely by simply delaying its submission of an administrative claim. *Id.* at 27.

that the plaintiff's claim accrued upon the date of injury. *Id.* The analogous rule here is that petitioners' claims accrued upon the date of breach, as they allege. Further, there is no optional administrative claims process in this case through which petitioners might attempt to defer the accrual of their claims. Thus, petitioners' claims simply do not present any of the dangers that the Court confronted in *McMahon*.[22]

Finally, contrary to the government's suggestions, the accrual principles advanced by petitioners do provide certainty. Each petitioner's claim accrued when the FmHA failed to perform its contractual obligations and would become time-barred six years thereafter. Permitting Section 515 owners like petitioners to await the time for performance before their claims are deemed to accrue ensures that the only owners who will file suit are those who actually desire to exercise their termination option[23] and have been denied. The government's approach, on the other hand, would compel every Section 515 owner to file suit based on the enactment of the 1988 legislation, regardless of whether or when they might attempt to exercise their option to leave the program and regardless of whether the agency would have permitted them to do so upon their request.

II. Adverse Action By The FmHA Was Also Required For Petitioners' Takings Claims To Accrue.

A. No Court Has Ever Adopted the "Parasite Exception" Advocated By The Government.

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[22] The holding in *McMahon* has also been expressly rejected in contract cases. *See Nager Elec. Co.*, 368 F.2d at 859, 863-65 (specifically rejecting the application of *McMahon* to contract claims subject to mandatory claims process); *see also Friedman v. United States*, 310 F.2d 381 (Ct. Cl. 1962).

[23] In fact, an owner who had no intention of prepaying would have no right to sue based on the 1988 legislation, in that a plaintiff cannot recover in an action for anticipatory repudiation unless it had the "willingness and ability to perform" under the contract had the defendant not repudiated. *See* Corbin § 978; *see also* App. 128 ¶38.

This Court's precedent on the ripeness of as-applied regulatory takings claims is not subject to serious dispute. *See* Pet. Br. 39. For its sole attempt to avoid that precedent, the government devises an exception to the doctrine for takings claims that are "parasitic" of a contract claim. Opp. 35-38. According to the government, the Court should adopt a new rule providing that any takings claim deemed to be parasitic of a contract claim must accrue for limitations purposes on the same date that the contract claim accrued. The government apparently would have this exception apply to all such parasitic takings claims, without regard to whether the claim is yet ripe for judicial review. This would create a potentially huge exception to this Court's takings jurisprudence that would apply in any case where the plaintiff's investment-backed expectations are premised upon representations arguably constituting a contract.

The government's assertion that petitioners' takings claims are nothing more than leeches living off of their contract claims is incorrect and misstates petitioners' pleadings. While petitioners' contract claims are premised on the FmHA's failure to perform according to the terms of the parties' contracts, their takings claims are based on the interference with their real property interests caused by the agency's application of the 1988 legislation, which resulted in the continuation of onerous restrictions on the use of their properties. App. 131. Thus, petitioners do not, as the lower court presumed, assert a taking of their contract rights. As the title owners of their land and buildings, petitioners seek just compensation for the taking of their state-created real estate interests. As a result, petitioners' takings claims are wholly independent from their contract claims. The government's assertions to the contrary are nothing more than premature attacks on the merits of petitioners' claims.

More fundamentally, the question of when a takings claim accrues is governed by a wholly separate analysis from the question of when a contract claim accrues. While a

contract claim accrues on the date of breach, an as-applied takings claim accrues when the agency charged with implementing the statute at issue renders a decision on the application of the law to the property in question. Pet. Br. 39-40. In this case, both claims happened to accrue at the same time, in that the FmHA's rejection of an owner's prepayment request qualifies as both a failure to perform under the contract *and* a final decision on the application of the 1988 legislation.[24] The government's analysis, however, would require courts to ignore the distinctions between the principles governing the accrual of contract and takings claims. Thus, the Court should decline the government's request that it graft a "parasite exception" onto the law regarding the accrual of as-applied takings claims.

B. The Government Would Have The Court Hold That Petitioners' Takings Claims Accrued Before They Became Ripe For Judicial Review.

The law is clear that petitioners' takings claims did not accrue until they ripened through the FmHA's application of the 1988 legislation to their properties. Pet. Br. 39-41. It also goes without saying that a takings claim cannot accrue for limitations purposes until it becomes ripe for judicial review. *Id.* 41 n.43. Tellingly, the government never goes so far as to assert that petitioners' takings claims were ripe on the date that the 1988 legislation was enacted. Instead, it essentially argues that those claims should be deemed to have accrued on that day irrespective of whether they were yet ripe.

Thus, the rule that the government asks the Court to adopt would provide that a takings claim can accrue for

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[24] Thus, contrary to the government's insinuations, there is nothing in petitioners' approach that would require the accrual of both claims to fall on the same date if ordinary principles of law mandated a different accrual date for each claim. Here, for example, any affirmance of the lower court's dismissal of petitioners' contract claims would not require a dismissal of their takings claims unless the government's "parasite exception" were adopted.

limitations purposes before it ripens. If accepted, the government's approach would create judicial inefficiencies and undermine the very purpose of the ripeness doctrine. It would in some cases require courts to take jurisdiction over takings claims while a request concerning the property at issue is still pending before the relevant agency (or perhaps even before the plaintiff has submitted a request). Courts would be required to hear such cases even though the agency's ultimate decision might be to grant the request, thereby eliminating the need for a lawsuit in the first place.

The government also asserts that the ruling below is perfectly consistent with the *Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999). Abandoning its arguments before the lower courts, the government now asserts that *Greenbrier* is inapposite because the property rights at issue there were contained in a contract to which the government was not a party. Opp. 39. However, nothing in *Greenbrier* turned on the nature or source of the property right at issue. Rather, the holding was guided by the nature of the legislation, which, like the legislation here, provided an exception authorizing the agency to accept prepayments without restrictions when it determined that there was no longer a need for the housing. *Id.* at 1358; *see* Pet. Br. 42. Thus, the conflicting holdings in *Franconia* and *Grass Valley* aptly demonstrate the extent to which the government has been permitted to assert directly contrary positions in different cases to obtain dismissal of otherwise meritorious claims.

CONCLUSION

For the reasons set forth above and in petitioners' opening brief, this Court should reverse the decisions of the Federal Circuit and direct that it remand petitioners' claims to the Court of Federal Claims to be decided on their merits.

April 8, 2002

Respectfully submitted,

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In The

Supreme Court of the United States

FRANCONIA ASSOCIATES et al.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Federal Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties written consent to file this brief as amicus curiae in support of the petitioners. The letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 205,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. NAHB, therefore, is concerned with any judicial decision that calls into question the remedies available to its members under the U.S. Constitution and federal statutes.

Since its inception, NAHB has played an integral role in increasing affordable housing for low-income people. Many of its members construct multifamily buildings, including government-subsidized housing.

NAHB has been before the Court as amicus curiae or as "of counsel" to the landowner in a number of cases involving the rights of property owners and the remedies available to them when their rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional*

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[1] Pursuant to Rule 37.6 of this Court, amicus state that their counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *First English Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Reservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, --- U.S. --- (oral argument held January 7, 2002).

SUMMARY OF ARGUMENT

This Court has made clear that a takings claim does not accrue until the government has denied compensation. Furthermore, this Court and lower courts have never made a distinction between monetary takings claims and real property takings claims. Thus, the Federal Circuit erred in holding that the petitioner's takings claim accrued when Congress enacted ELIHPA in 1988.

THE PROPERTY OWNERS IN THE CASE AT BENCH SHOULD NOT BE TIME-BARRED FROM BRINGING A TAKINGS CLAIM, BECAUSE ANY SUCH CLAIM COULD NOT HAVE ACCRUED UNTIL THE GOVERNMENT APPLIED THE STATUTE TO THE PETITIONERS' PROPERTY.

NAHB's brief addresses the second question presented:

> Whether a Fifth Amendment takings claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans.

The Federal Circuit answered that question affirmatively: all takings claims based on the Emergency Low Income Housing Preservation Act of 1987 ("ELIHPA") first accrued when that statute was passed in 1988. So, according to the Federal Circuit, the last time a takings claim could have been filed under ELIHPA was in 1994. *See Franconia Associates v. United States,* 240 F.3d 1358, 1365-66 (Fed. Cir. 2001). That was the wrong result.

The Federal Circuit itself recognized, "[a] clair against the United States first accrues when the government's liability is determined." *Franconia Associates,* 240 F.3d at 1363 (citing *Kinsey v. United States,* 852 F.2d 556, 557 (Fed. Cir. 1988)). As this Court has made clear, not all takings violate the Fifth Amendment. The constitutional infraction arises where the

taking goes uncompensated. See, e.g., *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 734 (1997) (stressing "Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment"). Accordingly, any takings claims the FmHA borrowers may bring, *as applied to them,* could not have accrued simply upon Congress's passage of ELIHPA. (The claimants do not posit their case as a facial challenge.) Rather, an as-applied ELIHPA taking would have accrued only when the government denied one of the claimant's requests to prepay his or her loan.[2] The six-year clock in 28 U.S.C. § 2501 would have started ticking from that point forward, and the Federal Circuit acted in error by ruling otherwise.

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[2] The FmHA can accept prepayment without making efforts to extend the low income use if certain conditions exist. 42 U.S.C. § 1472(c)(5)(G) (1988). Furthermore, the Federal Circuit recognized that there was a process whereby a borrower could prepay his or her loan:

> Subtitle C imposes restrictions on prepayments of section 515 mortgages that originated before December 21, 1979. One restriction, codified in 42 U.S.C. § 1472(c)(4)(A) (1988), requires that *before FmHA can accept a prepayment,* it must "make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities for not less than the 20-year period beginning on the date on which the agreement is executed."

Franconia Associates, 240 F.3d 1361 (emphasis added).

A. Takings Cases Decided in the Real Property Context Apply Equally When Monetary Property is Taken.

"[T]he mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." *United States v. Riverside Bayview Homes,* 474 U.S. 121, 126 (1985) (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 293-297 (1981)). In both *Riverside Bayview* and *Hodel*, the Court ruled that the mere enactment of a statute regulating the use of real property did not, by itself, effect a Fifth Amendment taking. *See Riverside Bayview,* 474 U.S. 121 (permitting scheme to fill wetlands under Clean Water Act Section 404); *Hodel,* 452 U.S. 264 (permitting scheme under the Surface Mining Control and Reclamation Act). Similarly, Congress's enactment of ELIHPA did not effect a taking. Therefore, no Fifth Amendment claim could have accrued just by virtue of that legislative enactment.

The Government argues that cases such as *Riverside Bayview* and *Hodel* are not applicable because they arose in the real property context while a taking of monetary property is at issue here.[3] Brief for United States in Opposition to Petition for Writ of Certiorari, at 17. But why? Any differences between real and monetary property should be irrelevant to examine when a takings claim accrues for statute of limitations purposes. In addressing substantive questions of takings liability the Court applies the same underlying principles whether real or monetary property is at issue. *Concrete Pipe and Prods. v.*

[3] The petitioners argue that this case is a real property matter. *See* Petition for Writ of Certiorari at 28-29. NAHB does not take a position on whether this is a monetary taking or a real property taking, but assert that the Court has never made a distinction.

Construction Laborers Pension Trust, 508 U.S. 602 (1993), is instructive. An employer company withdrew monies from a multiemployer pension trust fund. The Multiemployer Pension Plan Amendments Act (MPPAA) set up a scheme where an employer incurred "withdrawal liability" in such circumstances. *See id.* at 609. Under the MMPA if an employer withdraws funds it must re-pay that amount, with a penalty as calculated under the statute, back into the plan. The "withdrawal liability" is assessed by a notification and demand for payment. *Id.* at 610. Concrete Pipe filed a Fifth Amendment takings claim to challenge an assessment of withdrawal liability charged against it, totaling $190,465.57.

The Court ultimately concluded that Concrete Pipe suffered no Fifth Amendment taking. In reaching that conclusion, Justice Souter's majority opinion applied the rulings of *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978), *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470 (1987), *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) and *Hadachek v. Sebastian,* 239 U.S. 394 (1917)—all takings cases decided in the real property context. *See Concrete Pipe,* 508 U.S. at 643-645.[4] When the *Concrete Pipe* Court rejected the employers' claim that the withdrawal liability assessed against it rose to the level of a *Lucas*

[4] The converse is true as well. The Court has cited *Concrete Pipe* as persuasive authority in the context of real property takings. In *Dolan v. City of Tigard,* 512 U.S. 374 (1994), the Court concluded that conditions attached to a land use permit were a taking where they were not "roughly proportional" to the impacts of the proposed development project. In its analysis, the Court remarked that it "approved the principle" in *Concrete Pipe* that " 'a claimant's parcel of property [cannot] first be divided into what was taken and what was left' to demonstrate a compensable taking." *Dolan,* 512 U.S. at 401 (citing *Concrete Pipe,* 508 U.S. at 644).

"total taking," it applied the multi-factor *Penn Central* test to analyze whether compensation for a partial taking was due. *Compare Penn Central,* 438 U.S. at 124-25 (zoning case setting forth the test for a taking as an "ad hoc inquiry" balancing three factors: (1) the character of the government's action, (2) the regulation's economic impact on the property owner, and (3) the extent to which the regulation interfered with the property owner's reasonable investment-backed expectations) *with Concrete Pipe,* 508 U.S. at 644-46 (no taking under *Penn Central*'s framework).

Concrete Pipe is not unique. The Justices typically turn to *Penn Central* and its progeny when analyzing whether the government is liable for a Fifth Amendment taking of monetary property. *See e.g., Eastern Enterprises v. Apfel,* 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in part and dissenting in part) (holdings of land use takings case applied to health fund benefits for retired miners); *Phillips v. Washington Legal Found.,* 524 U.S. 156, 176 (1998) (Souter, J., dissenting) (employing *Penn Central* analysis to interest income from client trust fund accounts). Moreover, when land use agencies appear before the Court to defend themselves against takings liability, they commonly seek application of *Concrete Pipe*'s principles. This term, regulators urged the Court to apply *Concrete Pipe* in a manner that would find no taking under a temporary development moratorium. See Brief for Respondents, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* at 32 (No. 00-1167) (arguing that *Concrete Pipe* governs the Court's approach to the takings "denominator" problem). In prior years, agencies defending against takings claims have cited *Concrete Pipe* to avoid paying compensation from the

application of wetlands regulations,[5] coastal regulations that limited development in endangered species habitat,[6] and to determine whether a takings claim was ripe where the property owner failed to transfer development rights.[7] Finally, lower courts[8] and scholars[9] freely cite the Court's monetary takings cases as persuasive authority in real property takings cases, and vice versa.

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[5] Brief for Respondents at 25, *Palazzolo v. Rhode Island* (No. 99-2047) (citing *Concrete Pipe* to determine if takings inquiry is properly addressed to entire property or portion thereof).

[6] Brief for the Petitioner at 35, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (No. 97-1235) (citing *Concrete Pipe* on issue of distinct investment-backed expectations of pension plan participants).

[7] Brief for Respondent at 33, 34, 40, *Suitum v. Tahoe Regional Planning Agency* (No. 96-243) (quoting *Concrete Pipe* for approach employed in determining economic impact of regulation on property).

[8] *E.g., Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994) (citing *Concrete Pipe* when discussing "investment-backed expectations"); *District Intown Properties Limited Properties v. District of Columbia,* 198 F.3d 874, 884 (D.C. Cir. 1999) (citing *Concrete Pipe* in an analysis of "reasonable expectations"); *Villas of Lake Jackson, Ltd. V. Leon County*, 906 F.Supp 1509, 1516-17 (N.D. Fl 1995) (citing *Concrete Pipe* when analyzing the land owner's "bundle of rights); *City of Annapolis v. Waterman*, 745 A.2d 1000, 1024 (Md. App. 2000) (citing *Concrete Pipe* in determining whether requiring a developer to set aside recreational space was a taking).

[9] *E.g.*, Bradley C. Karkkainen, *Biodiversity and Land*, 83 Cornell L. Rev. 1, n. 484 (1997) ("Although *Concrete Pipe* involves the question of whether purely financial interests are subdivisible for purposes of takings analysis, its unequivocal language leaves little doubt that the principle applies to land as well."); James E. Holloway, Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life Under the Takings and Other Provisions*, 9 Dick. J. Env. L. Pol. 421, 453-54 (2001) (citing *Concrete Pipe* in discussion of how smart growth regulations can lead to the taking of a land owner's real property); Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue*, 27 Ariz. St. L.J. 423 (1995) (citing *Concrete Pipe* in article pertaining to the public trust doctrine and the takings clause).

It is interesting that here the Government would distinguish real property takings from monetary takings for purposes of 28 U.S.C. § 2501 accrual. After all, as an *amicus* the United States routinely relies on *Concrete Pipe* in real property takings cases.[10]

To conclude, this Court, parties arguing before this Court, and the lower courts, all apply the same factors and tests for takings liability whether real or monetary property is at stake. Accordingly, *amicus* NAHB submits that the Court must apply the principles from its real property cases to decide if a takings claim under ELIHPA accrued when Congress passed that statute. As shown below, the answer to that question is "no."

B. The Federal Circuit's Decision Below Cannot be Reconciled with *Palazzolo* or *Williamson County*.

The Federal Circuit's ruling below—that takings claims based on the effect of ELIHPA accrued when that statute was passed in 1988—cannot be reconciled with this Court's opinions in *Williamson County Regional Planning Comm'n v. Hamilton Bank* 473 U.S. 172 (1985), or *Palazzolo v. Rhode Island,* 121 S. Ct. 2448 (2001).

Palazzolo concerned restrictions on land development as the result of the application of state wetlands regulations. Rhode Island's Coastal Resources

[10] See, e.g., Brief for the United States as *Amicus Curiae* Supporting Petitioner in Part at 17, 24, *City of Monterey v. Del Monte Dunes at Monterey, Ltd* (No. 97-1235) (citing *Concrete Pipe* persuasively); Brief for the United States as Amicus Curiae in Support of Respondent, at 17, 18, 19, *Suitum v. Tahoe Regional Planning Agency*, (No. 96-243) (citing *Concrete Pipe* persuasively).

Management Council argued that Mr. Palazzolo was precluded from bringing a Fifth Amendment takings claim because he succeeded to legal ownership of the property *after* the Council issued regulations that limited development in coastal wetlands. In other words, the state argued that someone who acquired property post-enactment "is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Palazzolo,* 121 S. Ct. at 2462. The Court disagreed with the state's position and found the takings claim "was not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Id.* at 2464. Under the state's rule, "the post enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause." *Id.* at 2453. This Court rejected that rule.

The Federal Circuit's ruling below is in tension with *Palazzolo.* Under the Federal Circuit's analysis, if a landowner either owned real property or acquired it more than six years after the enactment of a land use statute, a takings claim would be barred. This, however, would put a six-year "expiration date on the Takings Clause," no matter "how extreme or unreasonable" the government's statute. [11] *Id.* at 2453, 2464.

[11] Furthermore, Fifth Amendment takings cases frequently arise where property owners sue the U.S. Army Corps of Engineers seeking compensation for the Corps' application of regulations to discharge dredged or fill material into navigable waters, promulgated under Section 404 of the Clean Water Act of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 884 (codified in 33 U.S.C. § 1344). All of these takings cases, based on effects of the Section 404 program, were governed by the same statute of limitations at issue in the case at bench—namely, the six-year statute of limitations governing suits against the federal government brought in the

The decision below also conflicts with *Williamson County*, the Court's seminal ripeness case for takings claims. A takings claim is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County,* 473 U.S. at 186. "The central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision from the Council determining the permitted use for the land." *Palazzolo,* 121 S. Ct. at 2458. Here, the ability of an FmHA borrower to prepay (or not) could not be known simply by ELIHPA's enactment in 1988. The statute established a process whereby some borrowers would, in fact, be allowed to pre-pay their loans.[12] No property owner would have a ripe takings claim under *Williamson County* without first resorting to ELIHPA's process to

Court of Federal Claims, 28 U.S.C. § 2501. Under the reasoning of the Federal Circuit's decision below, the following cases would have been time-barred because the impacted property owners initiated litigation more than six years after Congress enacted the Clean Water Act: *Good v. United States.*, 189 F.3d 1355 (Fed Cir. 1999) (takings case brought approximately 25 years after enactment of CWA); *Forest Properties Inc. v. United States,* 177 F.3d 1360 (Fed. Cir. 1999) (takings case brought approximately 25 years after enactment of CWA); *Howard W. Heck and Assoc., Inc. v. United States*, 134 F.3d 1468 (Fed. Cir. 1998) (takings case brought approximately 25 years after enactment of CWA); *Broadwater Farms Joint Venture v. United States*, 121 F.3d 727 (Fed. Cir. 1997) (takings case brought approximately 24 years after enactment of CWA); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (takings case brought approximately 18 years after enactment of CWA); *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) (takings case brought approximately 13 years after enactment of CWA); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed. Cir. 1993) (takings case brought approximately 10 years after enactment of CWA).

[12] *See supra* note 2.

receive a final decision on the viability of pre-payment. It was therefore incorrect for the *Federal Circuit* to rule that takings claims started to accrue upon ELIHPA's passage, because no claim could have yet been ripe at that point in time.

The Federal Circuit's decision is illogical in light of *Palazzolo* and *Williamson County.* If it were allowed to stand, the growing number of federal and state courts that rely on *Palazzolo* and *Williamson County* would be forced to make sense of a confusing inconsistency. In a climate where the regulation of land use is the rule, many property owners find themselves in the unfortunate position of bringing takings claims against regulatory agencies. Against that backdrop, this Court must ensure that fundamental takings issues concerning ripeness, post-enactment acquisition, and statute of limitations accrual are all consistent.

CONCLUSION

For these reasons, the National Association of Home Builders urges this Court to reverse the opinion of the Federal Circuit and clarify that a takings claim does not accrue simply upon legislative enactment of a statute.

DATED: February 13, 2002

Respectfully submitted,

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No. 01-455

IN THE
Supreme Court of the United States

FRANCONIA ASSOCIATES, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF FOR JOHN K. CASTLE, et al. AS AMICI CURIAE SUPPORTING PETITIONERS

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30 AP

QUESTION ADDRESSED BY AMICI

The second question on which this Court has granted certiorari is "[w]hether a Fifth Amendment takings claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans." The government has asserted, as an ostensible "antecedent" to the resolution of this question, that petitioners' takings claims cannot be maintained independently of their claims for breach of contract. Opp. 16. *Amici* address the question inherent in this argument, *viz.*: Whether the government's abrogation of rights secured by a citizen under a contract with the government can give rise to an independent claim for just compensation under the Takings Clause.

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IN THE

Supreme Court of the United States

No. 01-455

FRANCONIA ASSOCIATES, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

BRIEF FOR JOHN K. CASTLE, et al. AS AMICI CURIAE SUPPORTING PETITIONERS

John K. Castle, *et al.* respectfully submit this brief as *amici curiae* supporting petitioners.*

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to our Constitution provides, in pertinent part, that "private property [shall not] be taken for public use without just compensation."

* Pursuant to this Court's Rule 37.6, *amici* represent that counsel for a party did not author this brief in whole or in part, and that no person other than *amici* or their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), letters from all parties consenting to the filing of this brief have been lodged with the Clerk.

INTEREST OF AMICI AND SUMMARY OF ARGUMENT

1. *Amici* John K. Castle, *et al.* are the named plaintiffs in a pending lawsuit in which they allege that the government both committed a breach of contract and engaged in an uncompensated taking by enacting and enforcing legislation (the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("FIRREA")) that, *inter alia*, abrogated certain rights *amici* had secured by a contract with the government. *Castle* v. *United States*, 42 Fed. Cl. 859 (1999) & 48 Fed. Cl. 187 (2000), *appeals pending*, Nos. 01-5047 & 01-5050 (Fed. Cir. argued Dec. 7, 2001).** The trial court in *Castle* agreed that the enactment of FIRREA, and its subsequent implementing regulations, resulted in a compensable breach of *amici*'s contract with the government. 48 Fed. Cl. at 216; *see*

** In addition to Mr. Castle, *amici* are Leonard M. Harlan, Donald C. Carter, Double S&M Partnership, Grace & Green Arbitrage Partners, Hudson Valley Partners, L.P., Dan W. Lufkin, MCI Two Investment Limited Partnership, Robert Marston, McD Merger Arbitrage Fund, Ltd., L.T. Foster, Northern Trust Co., Trust #2-67917 (Kate T. Foster Trust FBO), R.C. Foster, Northern Trust Co., Trust #2-67918 (Kate T. Foster Trust FBO), J.R. Foster, Northern Trust Co., Trust #2-67919 (Kate S. Thompson Trust FBO), Public Service Resources, Society Bank & Trust-Trustee, Zane Tankel Partners, Robert V. Dolan, M.D., Leo W. Kwan, M.D. Pension and Profit Sharing Trusts, Robert B. Lyons, Robert Margolis, Fosven Associates Partnership, Stanley E. Roberts, M.D., Sanwa Bank of California, Trustee, Yorba Linda Medical Group FBO Russell E. Ewing, Castle Harlan, Inc. and Cewnick Fund.

United States v. *Winstar Corp.*, 518 U.S. 839 (1996) (holding that the government is liable for FIRREA-related breaches of contract). The trial court in *Castle* also held, however, that *amici* could not maintain an action under the Takings Clause. *See* 48 Fed. Cl. at 217-20. *Amici* have appealed the rejection of their takings claim to the Federal Circuit.

Like *amici*, petitioners have alleged that the government's enactment and enforcement of certain legislation (the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, Tit. II, 101 Stat. 1877 ("ELIHPA")) resulted both in a repudiation of their contracts with the government and in a taking of their property within the meaning of the Fifth Amendment. The courts below did not reach the merits of either claim, but instead concluded that petitioners had not filed suit within the six-year statute of limitations applicable to actions against the federal government. *Franconia Assocs.* v. *United States*, 240 F.3d 1358 (Fed. Cir. 2001), *aff'g* 43 Fed. Cl. 702 & 44 Fed. Cl. 315 (1999).

2. *Amici* have no direct interest in the resolution of the specific questions on which this Court has granted certiorari—*i.e.*, whether petitioners' causes of action accrued for purposes of 28 U.S.C. § 2501 upon the enactment of ELIHPA (as the government contends) or at some later date (as petitioners contend). *See* Order in No. 01-455 (Jan. 4, 2002) (granting certiorari limited to specified questions). In contrast to petitioners, *amici* filed their lawsuit well within six years of the enactment of FIRREA, and the government has never asserted a statute of limitations defense in *Castle*. *Cf. Plaintiffs in Winstar-Related Cases* v. *United States*, 37 Fed. Cl. 174 (1997), *aff'd sub nom. Ariadne Financial Servs. Pty.*

Ltd. v. *United States*, 133 F.3d 874 (Fed. Cir.) (addressing accrual of FIRREA-related cases), *cert. denied*, 525 U.S. 823 (1998).

Amici do have a direct interest, however, in one of the arguments the government has raised in its opposition to the petition for a writ of certiorari. With respect to petitioners' claims under the Takings Clause, the government argues, "[a]s an antecedent matter," that "petitioners' taking and contract claims are not distinct from each other." Opp. 16. The government also suggests that rights secured under a contract with the government may not be "property" within the meaning of the Takings Clause, and that "[i]nsofar as the government breached the contracts with petitioners, they had no independent takings claims because they had available a remedy in damages that was sufficient to provide 'just compensation' under the Fifth Amendment." *Ibid.* The government has made substantially the same argument—*i.e.*, that a party to a government contract, the repudiation of which has been authorized by congressional action, cannot maintain a takings claim independently of a claim for breach of contract—in the *Castle* case that is now pending in the Federal Circuit.

Amici are in general agreement with petitioners that the government's argument concerning the availability of the constitutional remedy of just compensation in this context goes to the merits of their takings claims, rather than to the commencement of the limitations period. *See* Pet. Reply 8-9. As such, it is not within the questions specified by the Court in its grant of certiorari, and the Court could properly decline to consider it. *Cf.* this Court's Rule 14.1(a); *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 122 S. Ct. 681, 694 (2002) (declining to consider argument not presented by petition). Nonetheless, the government can be expected to press this argument in its brief on the merits, presumably as an alternative ground for affirmance. *Amici* are therefore concerned that, in the event the Court reaches this argument, it be resolved correctly.

3. As *amici* explain below, the government's notion that the Takings Clause does not provide an independent remedy for the governmental action at issue in circumstances like those presented here is both erroneous and entirely unsupported by any decision of this Court. At the outset, there is no question but that rights secured under a contract with the government are property protected from uncompensated taking by the Fifth Amendment. *E.g.*, *Lynch* v. *United States*, 292 U.S. 571 (1934). Moreover, this Court's precedents make clear that the repudiation by the government in its sovereign capacity of an express promise may give rise to a claim under the Takings Clause independent of any common-law action the promisee might have for breach of contract. *E.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984). And the government is simply incorrect that contract damages necessarily equal the "just compensation" required by the Constitution; on the contrary, for a variety of reasons the remedies available under the law of contracts may fall short of providing just compensation as defined by this Court. *E.g.*, *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). In cases where (for whatever reason) contract remedies do not amount to just compensation, the government is required by the Takings Clause to make up the "constitutional shortfall." *E.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

Thus, in the event the Court reaches the substantive Takings Clause argument raised by the government and addressed by *amici*, it should make clear that the government's abrogation of rights secured by a citizen under a contract with the government can give rise to an independent claim for just compensation under the Fifth Amendment.

ARGUMENT

"The aim of the [Takings] Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 522 (1998) (plurality opinion) (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). It appears from the court of appeals' recitation of the facts of this case (and, for that matter, from the title of the statute itself) that Congress attempted, through the enactment of ELIHPA, to force petitioners and other similarly situated property owners to bear the costs of providing certain low-income housing rather than passing the financial burden of this program through to the general public. *See* 240 F.3d at 1361. Petitioners accordingly sued, in the alternative to their claims for breach of contract, for just compensation under the Takings Clause. Pet. 10.

In its opposition to the petition for a writ of certiorari, the government suggests that this Court need not address the accrual of petitioners' claims under the Takings Clause because the law of contracts, not the Constitution, affords the exclusive avenue of relief in these circumstances. *See* Opp. 16. This argument is premised on the government's contention that "the only 'property' that could have been taken was petitioners' contractual

prepayment right." *Id.* at 15. Petitioners dispute the government's characterization of the property right at issue, pointing out that ELIHPA impaired not only their contractual rights but also their ownership interests in the underlying real properties. *E.g.*, Pet. 28-29. This Court has made clear that, in such cases, the government must pay just compensation for the value of both tangible and intangible rights. *See Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327-30 (1893); *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, 690-91 (1897). In any event, the government's argument concerning the scope of the Takings Clause is incorrect regardless of the precise contours of petitioners' property (which is a question best addressed by the trial court in the first instance). *Amici* will therefore accept *arguendo* the court of appeals' characterization of the property at issue as petitioners' contractual "right to prepay their FmHA loans at any time." 240 F.3d at 1365.

1. The government purports to leave aside the question whether a contractual right "necessarily constitutes property under the Fifth Amendment," but expresses doubt as to whether "taking claims may be brought in this context at all." Opp. 16. This Court's precedents, however, admit of no doubt on that matter: Rights secured under a contract with the federal government—including petitioners' contractual rights to prepay their loans—constitute "property" within the meaning of the Fifth Amendment that cannot be taken by the government in its sovereign capacity without the payment of just compensation.

This Court has unequivocally held that "[v]alid contracts are property, whether the obligor be a private in-

dividual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch* v. *United States*, 292 U.S. 571, 579 (1934). In the nearly seven decades since *Lynch*, the Court has never retreated from this clear statement; on the contrary, the principle that contractual rights are property has repeatedly been reaffirmed by this Court. *See, e.g.*, *Connolly* v. *PBGC*, 475 U.S. 211, 224 (1986); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 135 (1974). As this Court has explained the holding of *Lynch*, "valid contracts are property within the meaning of the Taking Clause." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1003 (1984). The government has offered no basis for this Court to disregard settled precedent on this point.

Similarly, this Court has long recognized that the cancellation of a "contract . . . with the government" by authorized governmental action "is an exercise of the power of eminent domain, and the liability of the government is for just compensation." *De Leval Steam Turbine Co.* v. *United States*, 284 U.S. 61, 71 (1931). Again, this Court has never disavowed the principle that the government must pay just compensation for taking rights secured by contract, whether public or private. *See, e.g.*, *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 601-02 (1935); *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 123-26 (1924). Contrary to the government's intimation, this Court's precedents thus clearly establish that "taking claims may be brought in this context." *See* Opp. 16.

Indeed, the sole authority of this Court cited by the government in this section of its opposition—tellingly, as "but cf." (Opp. 16)—answers the question raised by

the government in favor of petitioners: "Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 19 n.16 (1977). As property, contract rights, like other intangible rights, are protected against uncompensated takings by the Fifth Amendment. *Monsanto*, 467 U.S. at 1003-04; *Armstrong*, 364 U.S. at 48-49. In the event the government in its sovereign capacity takes such property and fails (or refuses) to compensate the owner, the Takings Clause affords a remedy. *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1, 5 & n.6 (1984); *United States* v. *Clarke*, 445 U.S. 253, 257 (1980). Thus, the government errs in implying that petitioners may not be able to maintain claims under the Takings Clause for the government's abrogation of their contractual rights.

2. The government next contends that "petitioners' taking and contract claims are not distinct from each other." Opp. 16; *see also ibid.* ("petitioners' taking claims are . . . entirely parasitic on their contract claims"). This argument is also squarely foreclosed by this Court's precedents.

The Court made clear in *Monsanto* that the government's breach of promise gives rise to a claim under the Takings Clause. There, the Court held that an "explicit governmental guarantee" of confidentiality gave rise to a reasonable, investment-backed expectation that data submitted to the government would be maintained in confidence. 467 U.S. at 1011. The government's repudiation of that promise by releasing the data was remediable under the Takings Clause. *Ibid.*; *see also Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-80 (1979) (implicit governmental promise gave rise to reasonable

expectation protected by Takings Clause). So, too, here: The government's promise that petitioners could prepay their loans may well have given rise to legitimate expectations, protected by the Takings Clause against government interference, that they would, in fact, be allowed to prepay their loans.

The government has previously argued that *Monsanto* is distinguishable on the ground that a party to a government contract can reasonably expect only that the government will pay contract damages in the event of a breach. This contention is irreconcilable with *Lynch* and other cases in which this Court has held that the government may be held liable under the Takings Clause for abrogating contractual rights, as discussed above. That the promise in *Monsanto* was made pursuant to statute, whereas the promise in this case was made pursuant to a contract authorized by statute, is not a difference with any constitutional significance. The *Monsanto* plaintiff could have sued the government for breach of contract on the same facts. *See Airborne Data, Inc.* v. *United States*, 702 F.2d 1350 (Fed. Cir. 1983). The *Monsanto* Court nowhere suggested that the availability of an alternative contract remedy that does not itself provide just compensation within the meaning of the Takings Clause could possibly preclude the recovery of just compensation in the event of a governmental taking. But that is effectively the rule that the government is urging on the Court.

Acceptance of the government's reasoning would lead to the absurd result that citizens who received non-contractual promises from the government (as in *Monsanto* and *Kaiser Aetna*) would receive more constitutional protection than those (like petitioners) who in-

sisted that the government formalize its promises by contract. To reach such a result, the Court would have to conclude that petitioners, by signing their loan agreements, implicitly waived the protections afforded them (like all citizens) by the Fifth Amendment. Such a conclusion would conflict not only with this Court's pronouncements that waivers of constitutional rights must be both knowing and voluntary (*e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 463 (1938)), but also with the plain terms of petitioners' contracts, which nowhere include such a waiver. *See* Pet. App. 165-77.

It is revealing that the government does not (and cannot) cite a single authority from this Court for the proposition that a party to a contract abrogated by the government in its sovereign capacity cannot maintain a takings claim independent of any claim it may have for breach of contract. That is because there is no such authority. On the contrary, this Court has made abundantly clear that "[j]ust compensation is provided for by the Constitution and the right to it cannot be taken away by statute." *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 304 (1923). Indeed, any effort by the government to preclude property owners from suing for just compensation would, itself, be unconstitutional. *See Preseault* v. *ICC*, 494 U.S. 1, 11 (1990); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978). Where the government, as sovereign, takes private property—including contractual rights—it is constitutionally obligated to pay just compensation.

In fact, an argument closely analogous to the one made by the government in this case has already been rejected by this Court. In *First English Evangelical Lu-*

theran Church v. *County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987), the Solicitor General had argued that "the [Fifth] Amendment itself is . . . not a remedial provision." The Court held that numerous precedents "refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.' . . . [T]hese cases make clear that it is the constitution that dictates the remedy for interference with property rights amounting to a taking." *Ibid.*; *see also id.* at 316 ("in the event of a taking, the compensation remedy is required by the Constitution"). Thus, the Constitution affords petitioners a remedy wholly independent from any relief that may be available under the law of contracts.

Any doubt on this score is laid to rest by this Court's decision in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985). There, a discharged public employee sued for deprivation of property (his job) without due process; the State countered that he had received all the process he was due because the statutory procedures had been followed. This Court held that since the right to due process is conferred not by legislative grace, but by the Constitution, the answer to the question what process is due "is not to be found in the statute," but rather in the Fifth Amendment itself. *Id.* at 541. To that end, the Court rejected the argument, akin to the one advanced by the government in this case, that since the employee's property interest in his job was established by a statute that also prescribed a remedy for the deprivation of that interest, the only process that was due was set out in the statute. Instead, the Court held that once a property interest has been established, the Constitution specifies the remedy.

The same reasoning applies here: The remedy for a governmental taking of property—including rights secured by a contract—is provided not by statute or the common law of contracts, but by the Constitution itself. *Cf. Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation"). Accordingly, the question of what compensation is just cannot be resolved by reference to an external source of remedial law but rather by the plain terms of the Fifth Amendment, which mandates that the government pay "just compensation" when it acts in its sovereign capacity to take private property.

3. The government asserts that "[i]nsofar as the government breached the contracts with petitioners, they had no independent takings claims because they had available a remedy in damages that was sufficient to provide 'just compensation' under the Fifth Amendment." Opp. 16. This assertion can be correct only where contract remedies amount to just compensation, which has not yet been established in this case and, for a variety of reasons, may not be established in other cases in which the government in its sovereign capacity takes contractual rights.

a. For a variety of reasons, application of the law of contracts might yield a different monetary award than the Fifth Amendment. To state the obvious, the available remedies—just compensation under the Constitution; protection of the promisee's expectancy, reliance, or restitutionary interests in contract—are divergent. *See, e.g.*, *Russell Motor Car Co.* v. *United States*, 261

U.S. 514, 523-24 (1923). Whether petitioners ultimately will be able to recover more or less under the law of contracts than they may be entitled to under the Takings Clause depends on a variety of factors (such as the evidence, the parties' litigation strategies, and the trial court's rulings on numerous factual and legal issues) that have yet to be determined. Thus, it cannot be said at this stage of the litigation, as the government blithely does, that petitioners' contract remedies necessarily will amount to just compensation.

To be sure, in the event petitioners were to recover an amount, as contract damages, that equals or exceeds the constitutional requirement of "just compensation," petitioners could not also recover directly under the Constitution. That is because "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process yield[s] just compensation; then the property owner has no claim against the government for a taking." *Preseault*, 494 U.S. at 11. In such a case, petitioners' property interests might well be "fully protected by an ordinary breach-of-contract suit." *Lujan* v. *G&G Fire Sprinklers, Inc.*, 121 S. Ct. 1446, 1451 (2001).

By the same token, however, in the event petitioners' contractual damages are ultimately determined to be less than the amount that would constitute just compensation under the Constitution for any property taken from them by the government in its sovereign capacity, the Takings Clause remedy remains available to "cove[r] any shortfall between [the alternative] remedy and just compensation." *Monsanto*, 467 U.S. at 1018. The law is quite clear that the Takings Clause applies even if some other remedial scheme exists, and if the other remedy does not

afford the litigant just compensation, the Constitution requires the government to make up the "constitutional shortfall." *Regional Rail Reorganization Act Cases*, 419 U.S. at 156; *see also Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-95 (1985).

Where the federal government in its sovereign capacity acts to abrogate contractual rights, it could well be that litigants' contract remedies do not amount to just compensation. For example, the United States is generally immune from paying interest on awards in contract actions. *Library of Congress* v. *Shaw*, 478 U.S. 310, 317 (1986). The Takings Clause, however, requires that the government pay interest as an element of just compensation. *Id.* at 317 n.5; *United States* v. *Klamath Indians*, 304 U.S. 119, 123 (1938). Thus, all other things being equal (*e.g.*, if the trial court were to award as contract damages precisely the value of the property rights taken from petitioners by the government), the passage of time entailed in litigation would itself create a "constitutional shortfall" for which the Constitution would require compensation (assuming, of course, that the other requirements of a takings claim have been met).

The government has previously argued that the *Winstar* Court's recognition that a contract promisee is entitled either to performance or to damages for nonperformance (*e.g.*, 518 U.S. at 868-69) somehow forecloses a party to a government contract from asserting claims under the Takings Clause. Any such contention must fail. Neither the law of contracts nor the Takings Clause precluded the government from restricting petitioners' contractual rights; the government's decision to do so, however, gives rise to cognizable claims for both

contract damages and just compensation. *Compare id.* at 868, 870 (while contract did not "bar the Government from changing the way in which it regulated," subsequent legislation meant "the Government was unable to perform the promise and, therefore, became liable for breach"), *with First English*, 482 U.S. at 315 (Takings Clause is designed "not to limit the governmental interference with property *per se*, but rather to secure *compensation* in the event of an otherwise proper interference amounting to a taking"). While the *Winstar* plurality correctly observed that "damages are always the default remedy *for breach of contract*" (*id.* at 885 (emphasis added)), the Court did not purport to address what remedy would be available in the event of a taking of contractual rights by the government in its sovereign capacity. To the extent contract damages do not amount to just compensation, petitioners retain the constitutional right to pursue the constitutional remedy.

Since the Takings Clause is self-executing (*e.g.*, *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933)), the government cannot, by consenting to be sued under a regime that does not yield just compensation (as a breach of contract suit might not), preclude a plaintiff whose property has been taken from obtaining the relief provided for by the Constitution. An alternative scheme that does not afford an equivalent remedy cannot trump the constitutional requirement. *Loudermill*, 470 U.S. at 541; *cf. Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 226-27 (1995). Thus, because the law of contracts might not afford petitioners the just compensation that they would be due in the event of a proven governmental taking, petitioners may pursue their claims under the

Takings Clause independently of their claims for breach of contract.

b. The lower court decisions cited by the government are not to the contrary. *See* Opp. 16 (citing *Sun Oil Co.* v. *United States*, 572 F.2d 786 (Ct. Cl. 1978), *Transpace Carriers, Inc.* v. *United States*, 27 Fed. Cl. 269 (1992), and *Marathon Oil Co.* v. *United States*, 16 Cl. Ct. 332 (1989)). The government is presumably referring to the *Sun Oil* court's statement that "the concept of a taking as a compensable claim theory has limited application to the relative rights of party litigants when those rights have been voluntarily created by contract. In such instances, interference with such contractual rights generally gives rise to a breach claim not a taking claim." 572 F.2d at 818 (citation omitted); *see also Marathon Oil*, 16 Cl. Ct. at 338-39 (same). But, read in the proper context (which the government ignores), that statement has no applicability to the circumstances presented by this case.

Amici have no quarrel with the general principle, articulated in *Sun Oil*, that a party to a contract with the government *generally* may maintain only an action on the contract in the event of repudiation or breach, and cannot resort to the Takings Clause. That principle is not based, however, on either the merger or the mutual exclusivity of the two rights (as the government misleadingly suggests in its opposition), but rather on the character of the governmental action at issue.

The *Sun Oil* decision is based on the inarguable proposition that "[a] taking can occur only when the Government acts in its sovereign capacity," as distinguished from its proprietary capacity. *Gratz* v. *United States*, 25 Cl. Ct. 411, 420 (1992); *see, e.g.*, *United*

States v. *Hooe*, 218 U.S. 322, 335-36 (1910). When it enters into and repudiates or breaches contracts with private parties, the government frequently acts solely in its proprietary rather than its sovereign capacity. *See*, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703 (1949). For this reason, "[t]akings claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity." *Hughes Communications Galaxy, Inc.* v. *United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001). *Sun Oil* is a textbook illustration of this dichotomy.

At issue in *Sun Oil* was whether the Secretary of Interior's decision to deny several oil companies' request to construct a drilling platform, which decision had already been held to constitute a breach of the plaintiffs' lease contract with the government, also amounted to a taking. The Court of Claims' holding that no taking had been effected was based on its conclusion that the government was acting in its proprietary, rather than its sovereign, capacity: "[The government's] lease operations . . . represent activity by it in a proprietary capacity rather than a sovereign capacity. . . . Remedies for violation of any of their lease rights by plaintiffs must be directed at [the government] in its proprietary capacity and not in its sovereign capacity." 572 F.2d at 818. The other cases cited by the government in this regard similarly turn on the sovereign/proprietary distinction, not (as the government would have it) on the unavailability of a Takings Clause remedy in cases involving government contracts. *See*, *e.g.*, *Transpace Carriers*, 27 Fed. Cl. at 274 ("NASA acted in its proprietary capacity, not a sovereign capacity, in negotiating with TCI for the

transfer of the Delta program. Thus, TCI's remedy must be directed at NASA in its proprietary capacity, through the contract vehicle.").

In contrast to the situation in *Sun Oil* and like cases, where the government was acting only in its proprietary capacity in entering into and subsequently breaching the contracts at issue (as will often be the case with respect to government contracts), this Court has long recognized that the contractual relationships of the United States with its citizens may also involve the government acting in its sovereign capacity. *See*, *e.g.*, *Winstar*, 518 U.S. at 876 (plurality opinion); *Perry* v. *United States*, 294 U.S. 330, 350-54 (1935). When the government acting in its sovereign capacity repudiates or breaches a contract, it may be held liable for just compensation under the Takings Clause. *See*, *e.g.*, *Russell Motor Car*, 261 U.S. at 518-20. Indeed, Congress has previously recognized the government's constitutional obligation to pay just compensation for contracts abrogated as a result of subsequent legislation (*i.e.*, sovereign action). *See Hedstrom Lumber Co.* v. *United States*, 7 Cl. Ct. 16, 21 (1984).

The Court of Claims in *Sun Oil* recognized that the abrogation of contracts by the government in its sovereign capacity can give rise to liability under the Takings Clause. As the court explained, "[t]he significant fact in the *Lynch* case is that *congressional* action abrogated the contracts in issue thereby giving rise to a taking by authorized governmental action." 572 F.2d at 819 n.49. That is because an Act of Congress—such as ELIHPA or FIRREA—is indisputably an exercise of the sovereign power that must conform to the dictates of the Constitution. A litigant in the position of petitioners can therefore sue the government both for breach of contract

and for just compensation. *See, e.g., Prudential Ins. Co.* v. *United States*, 801 F.2d 1295, 1300 n.13 (Fed. Cir. 1986); *Far West Federal Bank, S.B.* v. *OTS*, 746 F. Supp. 1042, 1050-51 (D. Ore. 1990), *vacated on jurisdictional grounds*, 951 F.2d 1093, 1100 (9th Cir. 1991).

In this regard, the government might attempt to seize upon petitioners' statement that "the government was not acting in its capacity as the sovereign when it enacted ELIHPA." Pet. 16. Any such argument, however, would confuse the truism that the enactment of legislation constitutes action by the government in its sovereign capacity (the pertinent issue for purposes of takings analysis) with the so-called "sovereign acts" doctrine that may sometimes apply in government contract actions (the context in which *amici* understand that petitioners made the referenced statement). *But see* Opp. 12-13 n.4 (conceding that the "sovereign acts" doctrine is not implicated here). For example, while the "sovereign acts" doctrine has been deemed inapplicable to FIRREA (*Winstar*, 518 U.S. at 891-96 (opinion of Souter, J.)), "it was an unquestionably sovereign act of government—enactment and implementation of provisions of FIRREA regarding treatment of regulatory capital—that gave rise to respondents' claims for breach of contract." *Id.* at 920 (Scalia, J., concurring in judgment).

Thus, governmental action—such as the enactment and enforcement of ELIHPA in this case—may well be considered "sovereign," and subject to redress under the Takings Clause, regardless of whether it may be defended, as a matter of contract law, under the "sovereign acts" doctrine. *See Winstar*, 518 U.S. at 878-79 n.22 (plurality opinion). This follows from the rule that "the

actions of the government representative on which a taking claim is premised must be authorized[,] either expressly or by some necessary implication, by some valid enactment of Congress." *Sun Oil*, 572 F.2d at 819; *see, e.g., United States* v. *North American Transp. & Trading Co.*, 253 U.S. 330, 333 (1920). In this case, it is undisputed that the governmental action petitioners ultimately challenge—FmHA's refusal to accept prepayment of their loans—was expressly authorized by ELIHPA, an enactment of Congress. The sovereignty predicate for a takings claim is thereby established.

The government has previously argued that the takings remedy is unavailable in contract actions because "'[t]he two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other.'" *Plaintiffs in Winstar-Related Cases*, 37 Fed. Cl. at 187 n.9 (quoting *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925)). As Justice Scalia noted in *Winstar*, however, this Court's decision in *Horowitz* is at best a suspect precedent. *See* 518 U.S. at 923 (opinion concurring in judgment). Moreover, the quoted passage, which in any event is pure *dicta* (as the government there was acting only in its proprietary capacity and no question of fusion was presented), cannot be reconciled with this Court's subsequent decision in *Lynch*, which involved the government acting in both its proprietary capacity (as administrator of the war risk insurance program) and its sovereign capacity (as overseer of the federal fisc). *See* 292 U.S. at 575. More importantly, the *Winstar* plurality concluded, in the context of FIRREA, that "the Government's 'regulatory' and 'nonregulatory' capaci-

ties"—its sovereign and proprietary characters—"*were fused* in the instances under consideration." 518 U.S. at 894 (emphasis added). The plurality also recognized that "such fusion will be . . . common in the modern regulatory state." *Ibid.*

It appears that ELIHPA, a statute by which Congress expressly set out to repudiate contractual promises previously made by the government, is another example of the type of "fusion" of governmental roles that, in contrast to the *dicta* in *Horowitz*, the *Winstar* plurality expressly acknowledged. The government, in choosing to restrict FmHA's ability to accept prepayments, acted simultaneously in both its proprietary capacity (as lender) and its sovereign capacity (as sponsor of low-income housing in rural areas). The government's enactment and enforcement of the statute thus constitutes sovereign action that may be independently remediable under the Takings Clause notwithstanding any remedies petitioners might have available against the government in its proprietary capacity under the law of contracts.

4. The government's merits-based argument with respect to petitioners' claims under the Takings Clause is thus incorrect in all of its facets. The government has not cited any decision of this Court that supports any of the points made at page 16 of its opposition to the petition for a writ of certiorari. Indeed, this Court's precedents squarely rebut the government's contention that petitioners may not maintain takings claims independently of their claims for breach of contract.

Although *amici* have no direct stake in the questions on which the Court has granted certiorari, the foregoing analysis also demonstrates the error in the government's entirely unsupported assertion that petitioners' claims

under the Takings Clause necessarily accrued at precisely the same moment as their claims for breach of contract. Because petitioners' takings claims are independent of their contract claims, the accrual *vel non* of each cause of action must be evaluated separately under the law applicable specifically to it. Thus, the second question on which this Court has granted certiorari should be answered, not (as the government contends) by reflexive reference to the law of contracts, but rather in accordance with this Court's Takings Clause jurisprudence—in particular, the doctrine of ripeness. *See, e.g.*, *Palazzolo* v. *Rhode Island*, 121 S. Ct. 2448, 2459 (2001). *Amici* are in general agreement with petitioners that, because ELIHPA permits FmHA to accept prepayments in certain circumstances, their takings claims were not ripe—and thus did not "accrue" for purposes of 28 U.S.C. § 2501—unless and until they actually sought from, and were denied by, FmHA permission to prepay their loans. *Cf. Agins* v. *City of Tiburon*, 447 U.S. 255 (1980). Petitioners should therefore be afforded the opportunity to prove up their independent claims under the Takings Clause.

CONCLUSION

For the foregoing reasons, and in the event the Court reaches the question, the Court should make clear that the government's abrogation of rights secured by a citizen under a contract with the government can give rise to an independent claim for just compensation under the Takings Clause.

Respectfully submitted.

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No. 01-455

IN THE
Supreme Court of the United States

FRANCONIA ASSOCIATES, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* COUNCIL FOR AFFORDABLE AND RURAL HOUSING IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Council for Affordable and Rural Housing (CARH) is a nationwide nonprofit organization whose members collectively own and manage the majority of the Section 515 housing in the country. CARH is the leading industry voice on rural housing issues. As such, CARH serves as an advocate for its members on all issues that affect rural housing, including Section 515 housing. In addition, CARH conducts nationwide training and educational activities regarding the development and management of rural housing.

For the owners of Section 515 housing, nothing is more sacrosanct than the property rights attendant to such projects. It is the belief of CARH and its members that a taking of the property rights of Section 515 owners has been affected by the application of the Emergency Low Income Housing Preservation Act (ELIHPA) to such property rights. Therefore, if the decision below is sustained, CARH's members will be precluded from pursuing their claims for payment of just compensation for the taking of their property rights. Accordingly, CARH, on behalf of its members, has a vital interest in seeking the reversal of the decision under review.

[1] The parties have consented to the filing of this brief and the consents were filed with the Clerk of the Court contemporaneously with the filing of this brief. In accordance with Rule 37.6 of this Court, CARH states that its counsel as specified herein authored this brief in whole and no person or entity, other than CARH, or its members, made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

Owners of Section 515 projects have a bundle of property rights. Specifically, Section 515 owners have a fee simple interest in the projects they own. They had this interest when they entered the Section 515 Program and they have retained it throughout their participation in the Program.

The court below held that Petitioners' takings claims are barred by the applicable statute of limitations. The only property interest recognized by the court below in reaching this conclusion was the owners' contractual right to prepay their mortgages. No recognition was accorded to the fee simple property rights of Section 515 owners. In fact, the court below did not even address this fundamental property right of Section 515 owners. The lower court's failure to recognize the fee simple property interest attendant to Section 515 projects and held by the owners thereof is inconsistent with the terms of the Section 515 Program.

ARGUMENT

In the decision under review, the lower court ruled that Petitioners' taking claims accrued for purposes of 28 U.S.C. § 2501[2] on February 5, 1988, the date on which the Emergency Low Income Housing Preservation Act was enacted. A9.[3] Accordingly, the lower court held that

[2] 28 U.S.C. § 2501 states, "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

[3] "A__" refers to the Appendix filed as part of Petitioners' Petition for Writ of Certiorari. Although the decision by the lower court under review is reported at 240 F.3d 1358 (Fed. Cir. 2001), citations to that opinion are to the opinion as reproduced in the aforementioned Appendix.

Petitioners' takings claims are barred because they were filed more than six years after February 5, 1988.[4] Id.

In holding that Petitioners' taking claims are barred by the statute of limitations, the only property interest recognized and discussed by the court below was the Petitioners' contractual right to prepay the mortgages on their Section 515 projects.[5] Id. at A14. The court below failed to recognize that Petitioners' taking claims are also predicated on their State-created fee simple property interests which are the hallmark of the Section 515 Program. This failure by the court below is a serious flaw in the court's decision that requires reversal of the lower court's decision.

I. THE SECTION 515 PROGRAM

The Section 515 Program is so named because it is the program that was administered, at the time Petitioners became participants therein, by the Farmer's Home Administration ("FmHA"),[6] an agency of the Department of Agriculture, in accordance with Section 515 of the Housing Act of 1949, 42 U.S.C. § 1485. Section 515 authorized FmHA to make direct loans to private entities for the purposes of developing privately owned rental housing in

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[4] The Appeals Court also held that Petitioners' breach of contact claims are barred by 28 U.S.C. § 2501. Although of importance to its members, CARH has decided to deal only with the takings issue in its brief because of CARH's belief that it can provide insight to relevant matters on this issue not fully addressed by the parties.

[5] Although CARH agrees that Petitioners' contractual right to prepay is a recognizable property interest subject to taking, CARH believes, as discussed herein, that Petitioners' property interests are much broader than the contractual right to prepay.

[6] FmHA is now known as the Rural Housing Service (RHS).

rural areas for persons who were of low or moderate income or who were elderly or handicapped.

The first step in becoming a participant in the Section 515 Program was the filing of a preapplication form, along with certain required information. 7 C.F.R. § 1822.91(a) (1979).[7] Part of the information required to be submitted with the preapplication form was information showing that the proposed development site was owned or under option by the applicant. Part 1822, Subpart D, Exhibit F-6 (2)c. This was consistent with the requirement that an applicant had to own the housing and related land or become the owner when the loan closed. § 1822.84(a).

If a preapplication was approved, an applicant next submitted an application along with other required information. § 1822.92(a). If the application was approved, the loan docket was processed to the stage where a construction loan would normally close prior to the start of construction. § 1822.94(a). During this process: FmHA would obligate funds for the applicant's loan, § 1822.94(a)(1); the applicant would execute the required loan agreement, § 1822.94(a)(2); and the applicant would provide evidence (1) that it had deposited the required initial operating and maintenance capital into a general fund account, § 1822.94(a)(4)[8] and (2) of the terms and final arrangements for construction financing.[9] § 1822.94(a)(5).

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[7] All references to 7 C.F.R. Part 1822 are to the January 1, 1979 edition of the Code of Federal Regulations.

[8] A Section 515 loan was limited to 95% of the development cost or of the security value of the project, whichever was less. 7 C.F.R. § 1822.86(a)(2). The other 5% to be contributed by the applicant could have been in the form of cash or land or a combination thereof. Id. However, an applicant was required to contribute initial operating capital of at least 2% of the total development cost. § 1822.84(a)(5)(i).

The next step was the construction of the project. For all loans greater than $50,000, construction financing was required to be obtained by an applicant from a private lender when such a loan was available at reasonable rates and terms. § 1822.90(d)(2) and § 1822.94(b)(1). The majority of applicants obtained their construction loans from private lenders.[10]

When private financing was obtained, FmHA would notify the construction lender of its commitment to make a loan to an applicant after completion of construction. § 1822.94(b)(1)(ii). The FmHA loan proceeds would then be used to repay the construction loan. However, FmHA would also notify the construction lender that FmHA's commitment to make the loan on behalf of the applicant was contingent upon the applicant complying with any approval conditions imposed by FmHA, acceptable performance by the builder and payment of all construction bills. Id.

The loan from FmHA to the applicant could be closed, permanent instruments issued to evidence the indebtedness to FmHA and the loan proceeds used to repay the construction lender, only when the project was substantially completed and all bills paid. § 1822.94(b)(1)(vii). To evidence the indebtedness, prescribed forms from FmHA were to be used for the mortgage and promissory note. § 1822.95(b) and § 1822.95(c)(1). The promissory note was to be dated as of the date of closing. § 1822.95(c)(2).

[9] The regulations use the term interim financing.

[10] Applicants that did not obtain their construction loans from private lenders obtained them from FmHA.

The loan was considered closed when the mortgage was filed of record. § 1822.95(e). However, it was possible for an applicant to have the loan cancelled, and a completed project used for non-Section 515 purposes, if the loan was cancelled before the loan closing. § 1822.94(e).

II. THE PROPERTY RIGHTS OF SECTION 515 OWNERS PRIOR TO ENACTMENT OF ELIHPA

As already discussed, developers desiring to build rental housing projects pursuant to FmHA's Section 515 Program were required to own the project and land on which the project was built. This ownership interest of Section 515 owners was a fee simple absolute. A fee simple absolute is the broadest property interest permitted by law and continues indefinitely. Black's Law Dictionary, 7th ed.

During their participation in the Section 515 Program, owners agreed to abide by certain conditions imposed by FmHA. For example, owners agreed: not to discriminate or permit discrimination by any of its agents in the use or occupancy of the housing, 7 C.F.R. § 1822.88(g); to rent a project's units to eligible occupants,[11] Id. at § 1822.88(h); if operating on a limited profit basis, to limit their annual return to 8 percent of an owner's initial investment, § 1822.88(k); to comply with the National Flood Insurance Act of 1968, § 1822.88(o); and to comply with Section 114 of the Clean Air Act and Section 308 of the Federal Water Pollution Control Act. § 1822.88(r)(1)(i). Owners also agreed to: establish, maintain and operate certain accounts in the manner specified by FmHA, A167-

[11] An eligible occupant was defined as a senior citizen with low or moderate income or any family with low income, or a senior citizen without regard to income or a family with low or moderate income, depending on the type of loan from FmHA. 7 C.F.R. § 1822.83(e).

170 (¶¶ 5-9); submit an annual audit of a project's books and records to FmHA, A171 (¶ 10(c)); and submit annual budgets and operating plans to FmHA. A172 (¶ 10(g)(1)).

Despite these limitations agreed to by the owners of Section 515 projects, the owners retained the right to prepay their loans. A176 ("Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of the Borrower."). However, under regulations promulgated on October 27, 1980, prepayment would not be accepted unless the owner provided written notice to each tenant 60 days prior to submitting an offer to prepay. 45 Fed. Reg. 70775, 70798 (Oct. 27, 1980) (*codified at* 7 C.F.R. § 1944.250(a)(1) (1981)). The notice had to be posted within the building and include information about a possible change in ownership and any resulting changes that would occur as a result of the prepayment. Id. The District Director of FmHA reviewed the contents and procedure for tenant notification prior to approving prepayment. Id. After approval, the owner was required to provide additional written notices to tenants describing their priority rights to occupancy in other Section 515 projects if they were displaced. 7 C.F.R. § 1944.250(a)(2).[12]

III. THE PROPERTY RIGHTS OF SECTION 515 OWNERS AFTER ENACTMENT OF ELIHPA

After enactment of ELIHPA in 1988, the administrative restrictions on prepayment were increased, but prepayment without ongoing use restrictions was still possible, subject to several variables. Therefore, an owner could not know the effect of ELIHPA on its property until

[12] Approval was required if the District Director determined that an owner had complied with these tenant notification requirements.

the owner was prepared to prepay and offered to prepay its loan at a particular point in time.

Instances where prepayment is permitted without use restrictions include the following situations:

(1) RHS determines that housing opportunities for minorities would not be materially affected by the prepayment and there is adequate affordable rental housing in the area. 7 C.F.R. § 1965.215(c)(1)(iii) (2001).[13]

(2) If the loan is subject to a use restriction and its subsidy funding is terminated. Id. at § 1965.215(c)(3)(ii).[14]

(3) The project is offered for sale at market value to a qualified nonprofit entity and no bona fide offer to buy is made within 180 days, and RHS has funds to finance such a sale. § 1965.218(a).

(4) When no funds to finance a sale to a qualified nonprofit entity are available for 15 consecutive months. § 1965.218(b).

(5) Owners of Section 515 projects that receive project-based subsidies under section 8 of the U.S. Housing Act of 1937, 42 U.S.C. § 1437f, and who have current section 8 contracts at the time of prepayment may prepay their loans if RHS determines that prepayment would not materially affect housing opportunities for minorities.

[13] All references to 7 C.F.R. Part 1965 are to the January 1, 2001 edition of the Code of Federal Regulations.

[14] A Section 515 loan made before December 22, 1979 is subject to use restrictions if a servicing action was taken by FmHA. Loans made after December 22, 1979 but before December 14, 1989 are all subject to use restrictions.

§1965.215(c)(i) and (ii).[15] The section 8 contracts need not be renewed upon their expiration after prepayment of the Section 515 loan since the current tenants would be protected against the adverse impact of higher rents through the section 8 enhanced vouchers that they would receive after project-based section 8 subsidies are terminated. See 42 U.S.C. § 1437f(t).[16]

CONCLUSION

Owners of Section 515 projects have a fee simple absolute property interest in their projects. They had this interest before they became participants in the Section 515 Program and they have retained this interest throughout their participation in the Program, notwithstanding the use limitations and other restrictions to which the owners agreed.

A fee simple absolute is the most fundamental property interest. Yet, in the decision under review, the court below did not acknowledge the existence of such an interest. Rather, in holding that Petitioners' takings claims are barred by the statute of limitations, the court below focused exclusively on the contractual right of Section 515 owners to prepay their loans.

Any analysis of when Petitioners' takings claims accrued must take into account all of the property interests taken, as alleged by Petitioners. Failure by the court below to recognize the Petitioners' fee simple property interests

[15] Approximately 10 percent of Section 515 units are in projects with section 8 subsidies.

[16] Enhanced vouchers are used to subsidize an owner's rents at market levels. Upon the expiration and nonrenewal of a project-based section 8 contract, there are no limitations on the rents an owner can charge.

constitutes an error that requires reversal of the decision under review.

In several instances the owner of a Section 515 project may prepay a project's loan. Thus, housing market conditions and the availability of appropriations for purchases by nonprofits are the two main factors that determine whether the application of ELIHPA has affected a taking of the property rights of Section 515 owners. If circumstances are such that an owner of a Section 515 project is able to prepay a project's loan without any residual restrictions, the owner has not suffered a taking. Accordingly, the takings claim of a Section 515 owner is not ripe until the owner seeks prepayment and, for whatever reason, is not permitted to prepay without limitation. The failure by the court below to recognize this fundamental concept of takings law in determining when Petitioners' takings claims accrued also constitutes reversible error. For this, and the other reasons specified herein, *amicus curiae* Council for Affordable and Rural Housing requests that the Court reverse the decision by the lower court that Petitioners' takings claims are barred by the statute of limitations.

February 19, 2002

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IN THE
Supreme Court of the United States

FRANCONIA ASSOCIATES, *ET AL.*,

PETITIONERS,

v.

UNITED STATES,

RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF BANK OF AMERICA, FSB, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici Curiae are plaintiffs in eleven so-called "*Winstar*-related" cases pending in the U.S. Court of Federal Claims.[1] Those cases, which raise issues of the sort adjudicated by this Court in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), all involve statute of limitations questions under the Tucker Act, 28 U.S.C. § 2501 (2001), as does this case. All of the *amici* have alleged in their complaints that by virtue of the promulgation of regulations or other actions taken by the government under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified in scattered sections of 12 U.S.C.) ("FIRREA"), the United States breached its contractual obligations to the plaintiff or plaintiffs in question.

In *Plaintiffs in Winstar-Related Cases v. United States*, 37 Fed. Cl. 174 (1997) ("the FIRREA Limitations Decision"), the Court of Federal Claims rejected the government's argument that the limitations period applicable to *amici* was triggered on August 9, 1989, the date on which FIRREA was enacted into law. Instead, the court held that the limitations period commenced at the earliest on December 7, 1989, the day on which the relevant implementing regulations promulgated under FIRREA took effect. *Id.* at 184, 191. That holding has not yet been subject to appellate review, since the *amici's* cases are still proceeding at the trial level, with no final judgment having

[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

yet been entered.[2] *Amici* seek to make this Court aware of certain important aspects of this case that distinguish it from the *Winstar*-related cases, so that the Court can craft its decision without inadvertently addressing issues not presented here -- issues that are, by contrast, presented in the very different context of the *Winstar*-related cases. At a minimum, *amici* believe it will be helpful for the Court to have in mind the distinctions between this case and the pending *Winstar*-related cases.

For many of the reasons stated in the petition for *certiorari* in this case, *amici* believe that the decision below should be reversed. In particular, it is inconsistent with law, logic, fairness, and judicial efficiency to hold -- as did the Federal Circuit -- that a potential plaintiff who might not know for at least a decade or two whether it has in fact been injured by ELIHPA[3] (because it will not know until then whether it wishes to prepay its loan) nonetheless was required to file suit within six years of the enactment of that statute.[4] *See* Consolidated Petition for Writ of Certiorari at 4, 12-13, *Franconia Assocs. v. United States*, No. 01-455 (U.S. Sept. 10, 2001).

Amici's most critical interest, however, is in ensuring that if the decision of the Federal Circuit is affirmed, the Court will base its decision on the facts of this ELIHPA-related case and will not address facts and statutory regimes -- such as the statutory regime created by FIRREA -- that are not involved here and that may well be governed by principles other than those which the Court applies here. At the core of *amici's* concern is the fact that both the Court of Federal Claims and the Federal Circuit discussed (albeit briefly) an issue that is not actually presented by this case but that *is* presented, in the context of FIRREA, by the *Winstar*-related cases filed by *amici*. That issue, stated in the abstract, is whether the Tucker Act's six-year limitations period began to run at the time the statute in question was enacted or only when the regulations promulgated under the statute took effect. *Amici* hope to assist the Court by clarifying that issue in the contrasting contexts of this case and the *Winstar*-related cases.

SUMMARY OF ARGUMENT

This case does not present the question of whether Petitioners' claims accrued for limitations purposes on the date of ELIHPA's enactment as opposed to the effective date of ELIHPA's implementing regulations. Since the Petitioners' claims would be barred by the Tucker Act's six-year limitations period if their claims accrued on either of

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[2] In *Shane v. United States*, 161 F.3d 723 (Fed. Cir. 1998), and *Ariadne Financial Services Pty. Ltd. v. United States*, 133 F.3d 874 (Fed. Cir. 1998), the Federal Circuit held that two *Winstar*-related cases in which the complaints had been filed in February and April 1995, well after six years following the effective date of the regulations implementing FIRREA, were barred by the Tucker Act's six-year statute of limitations. However, that court specifically declined to address in its opinions in those cases whether the statute began to run with the enactment of FIRREA or on the date of its implementing regulations (or, indeed, on another date prior to February 1990, *see* note 6 below), since the complaints in those cases were untimely in any event. *Shane*, 161 F.3d at 727; *Ariadne*, 133 F.3d at 880.

[3] Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1877, codified as amended in relevant part at 42 U.S.C. § 1472(c) (1988) ("ELIHPA").

[4] *Amici* will assume herein knowledge of the ELIHPA statutory scheme and the facts of this case to the extent that they were presented in the Consolidated Petition for Writ of *Certiorari* and the Brief for the United States in Opposition to the Petition.

those dates, as contrasted with the later accrual dates suggested by Petitioners, an affirmance of the decision below need not and should not address the statutory-enactment/date-of-regulations issue.

In any event, any affirmance should be based on the facts and circumstances surrounding the statutory and regulatory scheme created by ELIHPA. That scheme differs from others, including the regime created by FIRREA. As the Court of Federal Claims has already held (pending appeal) in its FIRREA Limitations Decision, the relevant provisions of FIRREA did not become effective until the regulations promulgated thereunder took effect. That is not so in this case, where the pertinent aspects of ELIHPA became effective immediately. Should the Court affirm the decision under review and discuss the enactment date/date of regulations issue, therefore, *amici* respectfully ask that the Court make clear that its discussion does not govern different statutory/regulatory regimes, such as FIRREA's.

ARGUMENT

I. Whether The Limitations Period Commenced On The Date Of ELIHPA's Enactment Rather Than On The Effective Date Of Its Implementing Regulations Is Not Before The Court

The facts of this case will of course be explained in detail by the Petitioners and the Respondent. For *amici's* purposes, however, the key facts may be quickly summarized.

The enactment of ELIHPA, on February 5, 1988, itself limited, without further action by Government authorities, the ability of the Farmers Home Administration

of the Department of Agriculture (the "FmHA")[5] to accept prepayment of loans which the FmHA had made to the Petitioners. *Franconia Assocs. v. United States*, 240 F.3d 1358, 1364 n.3 (Fed. Cir. 2001). The regulations implementing ELIHPA, which elaborated on that already-effective limitation, took effect on May 23, 1988. *See* 7 C.F.R. § 1965.98 (1989). The relevant question addressed by the lower courts herein was whether the Petitioners' complaints for breach of contract, filed in 1997, were timely under the Tucker Act's six-year limitations period. The Petitioners argued (and continue to argue) that the limitations period did not and would not commence for a given plaintiff until the point in time -- which might be decades after 1988 -- at which that plaintiff sought to prepay a loan and was prevented from doing so by ELIHPA and/or its implementing regulations. Thus, the issue of whether the limitations period was triggered by enactment of the statute as opposed to implementation of the regulations promulgated under it is not presented by this case, since the Petitioners' complaints are barred by the statute of limitations unless their theory as summarized above is accepted (as we believe it should be) -- *i.e.*, the complaints are either timely or untimely regardless of what the answer to the date-of-enactment/date-of-regulations question might be.

The opinion of each of the lower courts, however, purported to address that question. The Court of Federal Claims ventured the view that the breach triggering the limitations period "occurred on May 23, 1988, when the FmHA's regulations, issued pursuant to the enabling

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[5] As the Federal Circuit noted in *Franconia*, 240 F.3d at 1359 n.1, "[t]he agency formerly known as the Farmers Home Administration has undergone several name changes, and is now known as the Rural Housing Service." As did the Federal Circuit, we will refer to all such agencies jointly as the "FmHA."

legislation, became effective." *Franconia Assocs. v. United States*, 43 Fed. Cl. 702, 709, *reh'g denied*, 44 Fed. Cl. 315 (1999). The Federal Circuit's opinion, however, asserted that "any breach would have occurred earlier, with the enactment of ELIHPA on February 5, 1988." *Franconia*, 240 F.3d at 1364 n.3.

Both of these assertions are mere *dicta*, however, since the statute-versus-regulations issue simply was not -- and is not -- presented by this case, as we have explained. Stated differently, the conclusion that each court reached, holding that the Petitioners' complaints were untimely, in no way rests on whether the limitations period began to run with ELIHPA's enactment or when its implementing regulations became effective. The Government specifically acknowledged this point in its Brief in Opposition to the Petition for Writ of *Certiorari* herein:

> The court of appeals held that the district court had erred in holding that the cause of action accrued on the date the regulations took effect (May 23, 1988), rather than the date ELIHPA was enacted (Feb. 5, 1988) . . . . *Nothing in this case turns on that distinction, however, since petitioners took far more than six years to file their claims, regardless of which date is used.*

Brief for the United States in Opposition at 7 n.1, *Franconia Assocs. v. United States*, No. 01-455 (U.S. Nov. 16, 2001) (emphasis added).

Thus, we respectfully suggest that the question of whether the statute of limitations began to run when ELIHPA was enacted or when the FmHA's regulations became effective need not and should not be addressed by the Court. Neither party has an interest in briefing the issue, since nothing in the case turns on it. *See, e.g., Air Courier*

Conference v. American Postal Workers Union, 498 U.S. 517, 531 (1991) (Stevens, J., concurring) (case should be decided on "best and narrowest ground available").

II. Whether The Limitations Period Commenced With ELIHPA's Enactment Or On The Effective Date Of Its Implementing Regulations Turns On The Facts Concerning ELIHPA And Resolution Of That Issue Would Not Necessarily Govern Comparable Questions Under Other Statutory Regimes

If the Court's opinion herein affirms the decision below and does discuss whether the limitations period in this case commenced with the statutory enactment or on the effective date of the relevant regulations, sound jurisprudential principles counsel that any such discussion be limited to the context of ELIHPA and the regulations implementing it, and not extend to other statutes and implementing regulations. Limiting any affirmance of the decision below in this fashion is especially important given the fact that, although under some statutory regimes the Tucker Act limitations period may start to run with the statute's enactment, under others it clearly does not. Each situation must be addressed on the basis of its own facts.

It may well be that in some circumstances enactment of a statute which itself directly and immediately abrogates or limits a party's rights under a contract with the United States and thereby immediately injures that party will trigger the Tucker Act's six-year limitations period. It is clear, however, that in some instances the limitations period associated with a statute affecting contract rights will start to run only at a later point in time. The most obvious such case is one in which a statute enacted on July 1 states that it shall not take effect until October 1. Clearly enactment of such a

statute is a mere anticipatory repudiation of any contract rights that its provisions might abrogate, and neither a breach nor any resulting harm would occur until October 1 at the earliest. One clear reason for this conclusion is that such a statute might be repealed on September 30, in which case neither a breach nor resulting harm would exist.

Slightly less obvious, perhaps, but subject to precisely the same analysis, is the statutory regime created by the enactment of FIRREA on August 9, 1989. The complex background of FIRREA, its implementing regulations, and the breach-of-contract suits to which it gave rise is set out in this Court's *Winstar* decision. *See* 518 U.S. at 855-61. Basically, the FIRREA-related statutory/regulatory regime precluded various savings and loans and other thrift institutions from using certain accounting methods that they had been permitted, pursuant to contracts with the government, to use previously to their advantage. More specifically, they were prevented from continuing to use so-called "supervisory goodwill" to count toward regulatory capital to the same extent that they had previously been permitted to do so by the contracts in question. Moreover, FIRREA expanded the previously unitary notion of regulatory capital to include three new categories: "tangible" capital, "core" capital, and "risk-based" capital -- and it made clear that the extent to which supervisory goodwill could count as regulatory capital would vary from category to category, with the exact contours of those categories and the definition of "supervisory goodwill" to be honed by the regulations that the newly-created Office of Thrift Supervision ("OTS") was directed to promulgate. *Id.* at 856-57; *Ariadne*, 133 F.3d at 876-77.

Critically, however, section 401(h) of FIRREA provided that all regulations formerly in effect regarding regulatory capital continued in effect until replaced. *See*

FIRREA § 401(h) (attached hereto at App. 1). The Conference Report accompanying FIRREA in fact explicitly stated that until OTS promulgated new regulations, the "capital regulations promulgated by the Federal Home Loan Bank Board remain in effect." H.R. Conf. Rep. No. 101-222, at 406 (1989), *reprinted in* 1989 U.S.C.C.A.N. 432, 445.

On November 8, 1989, the Federal Register published OTS' interim final regulations setting forth the regulatory capital standards and definitions required to implement FIRREA, including the definition of supervisory goodwill. Regulatory Capital, 54 Fed. Reg. 46,845, 46,869 (Nov. 8, 1989). In the regulations, OTS stated that the new capital requirements would become effective on December 7, 1989. OTS indicated that, at some point in the future, it would notify those institutions it believed would "fail one or more of the capital requirements *as of December 7, 1989*" and would direct such institutions to file capital plans or to take other actions. *Id.* at 46,865 (emphasis added). OTS also made clear that the first quarterly financial report in which thrifts would have to begin deducting supervisory goodwill from regulatory capital was the report for the fourth quarter of 1989, ending on December 31, 1989. Memorandum from OTS to Thrift Managing Officers at 1 (Dec. 1989) (attached hereto at App. 3); *see also* FIRREA Limitations Decision, 37 Fed. Cl. at 1893. There was no regulatory requirement that any deduction of supervisory goodwill be reflected in the September 30 third-quarter report; instead, thrifts were instructed to use the "same" approach to the third-quarter report that they had used in their second-quarter report. Memorandum from OTS to Thrift Managing Officers at 1 (Sept. 1989) (attached hereto at App. 6); *see also* FIRREA Limitations Decision, 37 Fed. Cl. at 183. The regulations did in fact become effective on December 7, 1989.

In its FIRREA Limitations Decision, the Court of Federal Claims held that the limitations period applicable to *amici's* breach-of-contract suits against the government did not begin to run with the August 9, 1989 enactment of FIRREA, but that it commenced only when the implementing regulations became effective on December 7, 1989.[6] 37 Fed. Cl. at 184, 191. The court noted that *amici's* claims were based on the government's alleged violation of its contractual duty to allow them (for varying periods of time) to recognize supervisory goodwill when calculating regulatory capital. Thus, the court concluded that under the theory asserted in the complaints, the government did not breach that obligation -- and *amici* were not harmed -- until (at the earliest) the regulations became effective, for until that time the statutory regime permitted them to continue to count supervisory goodwill toward their regulatory capital requirements:

> Unless the enactment of FIRREA entailed, in itself, some contractual nonperformance, it was merely an anticipatory repudiation and cannot serve as the trigger point for the statute of limitations.
>
> . . . FIRREA contained several provisions, not relevant to this litigation, that were apparently self-executing and did not require implementing regulations. Under th[e] paragraph setting forth the new capital standards, however, . . . promulgation of [the regulations] appears to have been the triggering act for any application of the new capital requirements. *See* H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 406 (1989) ("Until the capital standards required in this Act become effective, the capital regulations promulgated by the Federal Home Loan Bank Board remain in effect.") . . .
>
> For the fiscal quarter ending September 30, 1989, OTS instructed thrifts to fill out the required Thrift Report form in the same manner as they had for the quarter ending June 30, 1989. . . . It was not until the December 1989 Thrift Report, after the OTS regulations had taken effect, that thrifts were instructed not to complete certain fields on the report due to "the new capital regulation."

Id. at 183.

The Court of Federal Claims then summarized its analysis and its conclusion as follows:

> Thus, from the standpoint of statutory construction, FIRREA conditioned the implementation of its new capital standards on regulations that did not take effect until four months after the statute's enactment. . . .
>
> . . . Even assuming that FIRREA set forth terms that clearly contradicted the forbearance agreements, if those terms were not implemented until later, the moment of enactment did not constitute an actual breach. Until the actual implementation, there occurred no invasion of a legal right.

[6] There is in fact language in the Court of Federal Claims' opinion suggesting that perhaps the limitations period did not commence until either December 31, 1989, the date of the first quarterly thrift financial report reflecting the deduction of goodwill, or January 9, 1990, when the OTS issued a "Thrift Bulletin" making clear that thrifts that had contracts with the government regarding supervisory goodwill would not be excepted from application of the new regulations concerning regulatory capital. *See* 37 Fed. Cl. at 184; OTS, *Capital Adequacy: Guidance on the Status of Capital and Accounting Forbearances and Capital Instruments Held by a Deposit Insurance Fund*, Thrift Bulletin No. 38-2 (Jan. 9, 1990), *available at* 1990 WL 309397.

Id. at 183-84. Accordingly, the court held that the plaintiffs' complaints (including those of *amici*), which had been filed between August 9, 1995, and December 8, 1995, were timely.[7] This reasoning is entirely sound. In the context of FIRREA, in fact, the government itself, when it suited its purposes, had taken the same position thus adopted by the Court of Federal Claims. In two takings suits brought by *Winstar*-related plaintiffs after the enactment of FIRREA but before the effective date of its implementing regulations, the Government argued that:

> FIRREA's capital requirements have not even been effectuated . . . . [T]hose requirements do not take effect until the effective date of the Director's final regulations . . . [and therefore] plaintiffs' "property" cannot have been taken. . . .

Memorandum in Support of Defendants' Motion to Dismiss at 30, *Long Island Savings Bank, F.S.B. v. FSLIC*, No. CV-89-2699 (E.D.N.Y. Oct. 20, 1989) (attached hereto at App. 7); Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 31, *El Paso Savings Ass'n v. Director, OTS*, No. EP-89 CA 426 (W.D. Tex. Nov. 24, 1989) (attached hereto at App. 8).

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[7] In a recent decision the Court of Federal Claims held that as to one thrift, the limitations period commenced on a date that fell between August 9 and December 7, 1989. *Bank of America, F.S.B. v. United States*, 51 Fed. Cl. 500 (2002). On October 6, 1989, federal thrift regulatory authorities took specific action against the thrift in question by imposing FIRREA-related conditions on a proposed acquisition. In that instance, therefore (the court held), a breach and resulting harm occurred before the regulations became effective on December 7, 1989. Conceptually, the governmental action focused on there by the court may be viewed as the equivalent of a refusal to accept a prepayment request from one of the Petitioners herein, except that it occurred before rather than after promulgation of the relevant regulations.

By contrast, ELIHPA's effectiveness was in no way conditioned upon or postponed until the promulgation of implementing regulations. As the Federal Circuit explicitly stated, "[t]he *statutory command of ELIHPA, not its regulations*, eliminated the allowance of prepayments." 240 F.3d at 1364 n.3 (emphasis added).[8] It was precisely for that reason, in fact, that the Federal Circuit disagreed in *dictum* with the Court of Federal Claims' view (also expressed in *dictum*) that the limitations period began to run from the effective date of the regulations. *Id.* (citing *Alder Terrace v. United States*, 161 F.3d 1372, 1378 (Fed. Cir. 1988)).

Accordingly, should the Court affirm the result below, and should it wish for whatever reason to discuss the date-of-enactment versus date-of-regulations issue (an issue which, as we have noted, is not really presented), we respectfully ask that its opinion address the ELIHPA statutory scheme only, and that it not suggest in any way whether or to what extent it might extend to very different statutory regimes, such as FIRREA's.[9] Those questions, we

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[8] To be sure, ELIHPA provided that implementing regulations would be issued, *see* 42 U.S.C. § 1472(c)(5)(J) (2001), just as many if not most federal statutes so provide or contemplate. But unlike FIRREA, as outlined above, ELIHPA in no way conditioned or postponed application of any relevant provision until the effective date of such regulations. Nor is there any ELIHPA legislative history, comparable to the conference report accompanying FIRREA, indicating otherwise.

[9] Such an approach is in fact called for by the Court's careful framing of the contract-related question specified in its grant of *certiorari* (which differed from the parties' framing of that question):

> Whether a breach of contract claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts *a statute alleged to abridge a contractual right* to freedom from regulatory covenants upon *prepayment of government mortgage loans*.

submit, should properly be decided in cases that actually present them. The question of the triggering event for the limitations period in the context of FIRREA, for example, presumably will be addressed in due course by the Court of Appeals for the Federal Circuit when awards of damages -- which already have been made in some of the *Winstar*-related cases -- come before the Federal Circuit in cases that have been held to be timely in the FIRREA Limitations Decision.

CONCLUSION

Amici believe that the decision of the Federal Circuit should be reversed. Should the Court affirm that decision, however, *amici* submit that it should leave unaddressed the question of whether the applicable limitations period began to run on the date of ELIHPA's enactment or on the effective date of its implementing regulations, inasmuch as that issue is irrelevant to the outcome of the case.

Moreover, to the extent that the Court may affirm the decision below and may choose in *dictum* to discuss that issue, we respectfully ask that care be taken to restrict its analysis to ELIHPA. Under some statutory regimes, conceivably including ELIHPA (though we strongly disagree with such a characterization of ELIHPA), it may be that enactment of the statute in question triggers the Tucker Act's six-year statute of limitations. Under other regimes, however, such as the one created by FIRREA -- where application of a statutory provision is conditioned on the

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Franconia Assocs. v. United States, No. 01-455, 2002 WL 10619 (U.S. Jan. 4, 2002) (emphasis added). *Amici's* claim is not that "a statute [*i.e.*, FIRREA] abridged [their] contract[s]," but rather that later action based on FIRREA's regulations did so. Nor, of course, do *amici's* cases involve "prepayment of government mortgage loans."

promulgation of implementing regulations -- the statutory enactment alone clearly would not start the limitations clock running. At a bare minimum, the Court should avoid appearing implicitly to address or to resolve the limitations issue with respect to such other statutory regimes.

Dated: February 19, 2002 Respectfully submitted,

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APPENDIX

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[Excerpt from Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, 357 § 401(h)]

* * *

(h) CONTINUATION OF ORDERS, RESOLUTIONS, DETERMINATIONS, AND REGULATIONS. -Subject to section 402, all orders, resolutions, determinations, and regulations, which –

(1) have been issued, made, prescribed, or allowed to become effective by the Federal Savings and Loan Insurance corporation or the Federal Home Loan Bank Board (including orders, resolutions, determinations, and regulations which relate to the conduct of conservatorships and receiverships), or by a court of competent jurisdiction, in the performance of functions which are transferred by this Act; and

(2) are in effect on the date this Act takes effect,

shall continue in effect according to the terms of such orders, resolutions, determinations, and regulations and shall be enforceable by or against the Director of the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Housing Finance Board, or the Resolution Trust Corporation, as the case may be, until modified, terminated, set aside, or superseded in accordance with applicable law by the Director of the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Housing Finance Board, or the Resolution Trust Corporation, as the case may be, by any court of competent jurisdiction, or by operation of law.

* * *

[Excerpt from Memorandum from OTS to Thrift Managing Officers (Dec. 1989)]

[SEAL]

Office of Thrift Supervision
Department of the Treasury
1700 G Street, N.W.,
Washington, D.C. 20552

December 1989

TO: THE MANAGING OFFICER OF THE INSTITUTION ADDRESSED
THE INSTITUTION'S THRIFT FINANCIAL REPORT PREPARER

SUBJECT: DECEMBER 1989
THRIFT FINANCIAL REPORT

Enclosed, along with a supply of labels, are four sets of the December 1989 form to be used for completing this Thrift report. Date of requested data and filing date are as follows:

Report Month	Data Date	Filing Date
December 1989	12/31/89*	1/20/90

*Requested data to be provided regardless of your institution's fiscal year-end.

If your District Office of OTS has a requirement for the electronic transmission filing of the Thrift reports, your institution should disregard the following paragraph on the filing of the enclosed copy sets. This report must be filed, however.

Please submit your original and first copy sets of the completed December 1989 Thrift form to your District Office of OTS. The second copy set is to be kept for your institution's own use, and the last copy set may be used for requests made by state savings and loan departments. No copy set should be submitted to the Office of Thrift Supervision in Washington, D.C. Reproductions may be used but only if they are permanent and completely legible.

The December 1989 Thrift Report form is the same as the September 1989 Thrift Report form except that the December form always includes page A-1, Section I, Annual Supplement. The December 1989 Section I is the same as the December 1988 Section I. PLEASE NOTE: Because of the new capital regulation, only certain fields on the enclosed Section K, pages Q-9 and Q-10, need to be completed. Please see Attachment Section K immediately behind this letter for full details.

There are no new pages for the instruction book with this package.

A correct first submission eliminates the effort required for corrections. Please refer to the Instruction Book for information to help you properly complete the form. If you still have any questions regarding the completion of this report, please promptly contact the ICR Coordinator at your District Office of OTS for assistance.

Your cooperation and assistance in the prompt and accurate filing of this Thrift Financial Report are greatly appreciated by the Office of Thrift Supervision.

Sincerely,

George W. Hubler
System Industry Condition
Report Coordinator

Attachment

Enclosures

* * *

[Excerpt from Memorandum from OTS to Thrift Managing Officers (Sept. 1989)]

[SEAL]

Office of Thrift Supervision
Department of the Treasury
1700 G Street, N.W.,
Washington, D.C. 20552

September 1989

TO: THE MANAGING OFFICER OF THE INSTITUTION ADDRESSED
THE INSTITUTION'S THRIFT FINANCIAL REPORT PREPARER

SUBJECT: SEPTEMBER 1989
THRIFT FINANCIAL REPORT

Enclosed, along with a supply of labels, are four sets of the September 1989 form to be used for completing this Thrift report. Date of requested data and filing date are as follows:

Report Month	Data Date	Filing Date
September 1989	9/30/89*	10/20/89

*Requested data to be provided regardless of your institution's fiscal year-end.

If your District Office of OTS has a requirement for the electronic transmission filing of the Thrift reports, your

institution should disregard the following paragraph on the filing of the enclosed copy sets. This report must be filed, however.

Please submit your original and first copy sets of the completed September 1989 Thrift form to your District Office of OTS. The second copy set is to be kept for your institution's own use, and the last copy set may be used for requests made by state savings and loan departments. No copy set should be submitted to the Office of Thrift Supervision in Washington, D.C. Reproductions may be used but only if they are permanent and completely legible.

The September 1989 Thrift Report form is the same as the June 1989 Thrift Report form.

There are no new pages for the instruction book with this package.

* * *

[Excerpt from the Memorandum In Support of Defendants' Motion to Dismiss,
Long Island Savings Bank, F.S.B. v. FSLIC, CV-89-2699
(E.D.N.Y. Oct. 20, 1989) at 30]

* * *

In the instant case, plaintiffs claim that the application of FIRREA's regulatory restrictions on the use of goodwill to meet capital requirements has "taken" their property without just compensation. However, FIRREA's capital requirements have not even been effectuated. As discussed, supra, those requirements do not take effect until the effective date of the Director's final regulations and those regulations have not even been promulgated at this time. Thus, at this time, plaintiffs' "property" cannot have been taken and the question of whether the application of FIRREA to plaintiffs' capital computations constitutes a taking is not ripe for adjudication.

* * *

[Excerpt from Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 31, *El Paso Savings Ass'n v. Director, OTS*, No. EP-89 CA 426 (W.D. Tex. Nov. 24, 1989) at 31]

* * *

In the instant case, plaintiff claims that the application of FIRREA's regulatory restrictions on the use of goodwill to meet capital requirements has "taken" its property without just compensation. However, FIRREA's capital requirements have not even been effectuated. As discussed, supra, those requirements do not take effect until the effective date of the Director's regulations, December 7, 1989. Thus, at this time, plaintiff's "property" cannot have been taken and the question of whether the application of FIRREA to plaintiff's capital computations constitutes a taking is not ripe for adjudication.

* * *